p. 11 - local governing bodies may not be held liable, solely on the basis of respondeat theory, for employees' constitutional torts, citing Monell and Tarpley

pp. 12-18 - impropriety of award of damages for inherent value of constitutional rights

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2171

CHARLES PHILLIPS, ET AL.

v.

DISTRICT OF COLUMBIA, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 79-01726)

Argued November 23, 1981
Decided January 11, 1983

Edward E. Schwab, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel and *Michael Zielinski*, Assistant Corporation Counsel were on the brief, for appellants. *David P. Sutton*, Assistant Corporation Counsel also entered an appearance for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Peter J. Nickles, with whom *Ellen Bass*, *Joseph M. Fisher* and *Charles E.M. Kolb* were on the brief, for appellees.

Before: MACKINNON and EDWARDS, *Circuit Judges*, and ROBB, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Separate statements filed by MACKINNON and EDWARDS, *Circuit Judges.*

EDWARDS, *Circuit Judge*: Appellees, inmates in the Lorton Maximum Security Facility ("Maximum"), brought this class action against the District of Columbia and several of its officials and employees, challenging the conditions of their confinement on a variety of constitutional, statutory and common law grounds. At trial, appellees presented evidence of their exposure to the danger of violent assault and sexual abuse—a situation allegedly caused or exacerbated by understaffing, deficient security equipment and procedures, inadequate systems for classifying and segregating prisoners, and a poorly designed and deteriorating physical plant. The case was submitted to a jury, which returned a verdict finding that the appellants had violated (a) the Eighth Amendment to the United States Constitution; (b) their duty of due care under the common law; and (c) their statutory duty to provide the inmates with "safekeeping, care, protection, [and] instruction."[1] The jury awarded to each member of the class of appellees damages in the amount of one dollar for each day of incarceration between July 4, 1976 and June 20, 1980. The trial judge supplemented that award with injunctive relief designed to ameliorate conditions in Maximum found to be violative of applicable common law, statutory and constitutional standards.

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[1] The last of the three violations was predicated upon D.C. CODE ANN. § 24-442 (1981). The trial judge inexplicably failed to charge the jury on two of the appellees' statutory causes of action. That omission has not, however, been challenged on appeal.

Appellants attack the verdict and the awards of relief on several grounds.[2] We find merit in four of the allegations of error. First, the issuance of a protective order sharply curtailing the ability of appellants' counsel to discuss with their clients information obtained during discovery constituted, we conclude, an abuse of discretion. Second, the failure to instruct the jury that appellants could not be held liable on a *respondeat superior* theory for constitutional torts committed by prison guards was error. Third, the instruction concerning the danger posed to weaker inmates by their proximity to a group of violence-prone prisoners was misleading. Fourth, the authorization to the jury to award appellees damages for the intrinsic value of their constitutional rights was inconsistent with controlling precedent.

I. The Protective Order

In the course of trial preparation, appellees expressed reluctance to comply with appellants' discovery requests, fearing that the information they provided would somehow be transmitted to correctional officers inside Maximum and thence to other prisoners. The net result, they pointed out, would be to expose them to serious risk of violent reprisal. Appellants responded that they needed the information in question in order to prepare their defense. The trial judge attempted to devise a compromise solution to this dilemma. She granted appellants' motion to compel discovery. But, soon thereafter, she also granted appellees' motion for a protective order, pursuant to FED. R. CIV. P. 26(c), designed to prevent the facts revealed or allegations made in the course of discovery from entering the prison "grapevine."

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[2] In addition to the defects discussed below, appellants assigned as error (i) the District Court's decision not to enforce the notice requirement embodied in D.C. Code Ann. § 12-309 (1981), (ii) the court's refusal, despite the supposed absence of proof of "actual physical injury," to direct a verdict for appellants on the local law claims, (iii) the court's supposed failure to instruct the jury that to state a claim under the Eighth Amendment one need prove more than negligence, and (iv) the court's refusal to allow the jury to consider the fact that the District of Columbia does not control its own budget and appropriations. All four arguments are frivolous.

Our first task is to determine just how much the District Court restricted the ability of appellants' counsel to make use of the information they obtained. Unfortunately, the order was inartfully drafted. Viewed in isolation, it might be interpreted as prescribing only the situs of communications between appellants and their attorneys.[3] But such a reading would be inconsistent

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[3] The full text of the order reads:

> Upon consideration of plaintiffs' motion for protective order and defendants' response thereto, it is by the Court this 7th day of May 1980,
>
> ORDERED that plaintiffs' motion for protective order be and the same is hereby granted, and that counsel for defendants are directed that all deposition materials, including the reporter's tapes and notes, any prepared transcripts, as well as any documents or other tangible items produced by plaintiffs and other class members be placed under seal and not be publicly used or otherwise published by counsel for the defendants, defendants, or any of their agents, employees, officers or servants outside the offices of the District of Columbia Corporation Counsel until all unresolved questions as to their production and ultimate use at trial be brought before this Court for final resolution at the time of the pretrial conference. This protective order shall apply to the following areas of inquiry: class members' possession of weapons and contraband; their knowledge of other persons' participation in assaults or similar incidents; other persons' possession of weapons or contraband; identities and other information concerning correctional officers who conduct improper searches or otherwise violate regulations or reasonable procedures designed for the secu-

with the intent and understanding of the parties and, apparently, of the trial judge. Appellees certainly *sought* an order "prohibit[ing] defendants' counsel from in any way making known to the defendants information provided by plaintiff class members in depositions or other discovery proceedings." [4] Furthermore, the District Court explicitly stated that "plaintiffs' motion for protective order be and the same is hereby granted" [5] and gave no indication that the terms of the decree were any different from those requested; this strongly suggests that the order should be construed to comport with appellees' original plea. Any qualms we might have concerning such a construction are removed by the fact that the subsequent conduct of appellants, appellees and the trial judge makes plain that they all assumed that no discussion was permitted between appellants and their counsel concerning the fruits of discovery. The issue presented for review, therefore, is the validity, on the

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> rity or safety of the residents. Furthermore, defendants are barred from using the testimony and documents obtained in any disciplinary, administrative, or other judicial proceeding involving any plaintiff or other class member.

Appendix ("App.") 84-85.

Appellees argue, with some force, that the ban on disclosures "by counsel for the defendants, defendants, or any of their agents" presumes rather than forbids communication between appellants and their lawyers and that the order merely requires that all conversations take place in "the offices of the District of Columbia Corporation Counsel." Nevertheless, given the undisputed facts of this case, *see* text at notes 4-5 *infra*, we are constrained to construe this language as intending to restrict further dissemination of any information already in the hands of defendants. Otherwise, we must conclude that the language simply reflects clumsy draftsmanship.

[4] Motion for Protective Order, App. 75.

[5] *See* note 3 *supra*.

facts of this case, of a protective order forbidding not only all dissemination to the public but all disclosure by counsel to their clients of information of specified sorts obtained during discovery.

In general, district courts have broad authority, under Fed. R. Civ. P. 26, to distinguish reasonable and productive uses of the discovery procedures from abusive invocations of those procedures and to design protective orders to curtail the latter. *See Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977). Appellate courts will overturn such judgments only upon a clear showing of an abuse of discretion. *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

Protective orders that restrict dissemination to the public of discovered information, however, stand on a somewhat unusual footing. The resultant infringement of interests protected by the First Amendment, we have held, requires a district court to be careful to grant such an order only when essential to shield a party from significant harm or to protect an important public interest. *In re Halkin*, 598 F.2d 176, 190-91 (D.C. Cir. 1979). Moreover, the court must tailor the restraint so as to sweep no more broadly than necessary. *Id.* at 191.

District courts must be equally chary of issuing protective orders that restrict the ability of counsel and client to consult with one another during trial or during the preparation therefor. Such orders arguably trench upon constitutional interests at least as important as those infringed by restrictions on public dissemination of information. It is, of course, well established that due process requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In many situations, the right to a hearing would be meaningless were the litigant forbidden to obtain the assistance of a lawyer in determining the nature of the claims against him, the opposing arguments available to him, and the manner in which his case would be most effectively presented. *See* Note, *The Indigent's Right to Counsel In Civil Cases*, 76 YALE L.J. 545, 548-49 (1967). The foregoing considerations have prompted the Supreme Court to observe, in dictum:

> If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932) (emphasis added). Relying on similar arguments, some lower courts have expressly held that a civil litigant has a constitutional right to the assistance of hired counsel. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-18 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *Roberts v. Anderson*, 66 F.2d 874, 876 (10th Cir. 1933); *Rex Investigative and Patrol Agency, Inc. v. Collura*, 329 F. Supp. 696, 699 (E.D.N.Y. 1971) (dicta).

In order to decide the case before us, we need not elevate to constitutional status the right to the aid of counsel. It is sufficient for present purposes to recognize simply that every litigant has a powerful interest in being able to retain and consult freely with an attorney. Insofar as the fair administration of justice requires that all parties to a controversy be fully and equally informed of their entitlements, the public has a similarly important interest in preserving the ability of each disputant to confer with his lawyer. This public interest is reinforced by the value we place on the right of every litigant to participate in the process whereby justice is done—to understand and become involved in the proceeding, not to be compelled passively to await its outcome.[6] Regardless of whether these considerations are deemed to be inherent in the principle of due process, they must be accorded considerable weight by a trial judge when considering the propriety of issuing a protective order under FED. R. CIV. P. 26(c).[7]

We conclude, therefore, that the criteria set forth in our decision in *In re Halkin* as prerequisites for the issuance of an order restricting public dissemination of information obtained through discovery are equally applicable to the issuance of an order forbidding counsel to reveal such information to his client:

> The court must . . . evaluate such a restriction on three criteria: the harm posed by [disclosure] must

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[6] *See* Michelman, *Formal and Associational Aims in Procedural Due Process,* XVIII NOMOS 126 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502-03 (1978).

[7] Our insistence that the trial judge recognize the importance of these factors is not undermined by the fact that his discretionary control over the discovery process includes the power to cut off inquiry altogether in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c). Merely because the government (here acting through the judiciary) may withhold a benefit or "privilege" entirely does not mean that it is free to condition the receipt of such an entitlement on the recipient's renunciation of a constitutional right. *See Sherbert v. Verner,* 374 U.S. 398, 406 (1963) (state may not "condition the availability of [unemployment] benefits upon [the recipient's] willingness to violate a cardinal principle of his religious faith"); *Arnett v. Kennedy,* 416 U.S. 134, 211 (1974) (Marshall, J., dissenting) (observing that "a majority of the Court rejects Mr. Justice Rehnquist's argument that because appellee's entitlement arose from statute, it could be conditioned on statutory limitation of procedural due process protections . . . ."); TRIBE, *supra* note 6, at 510. We believe that the force in the present context of the foregoing principle would not be diminished even if a litigant's interest in consulting freely with his lawyer were not held to be constitutionally protected.

> be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on [attorney-client relations].

598 F.2d at 191 (footnotes omitted).

We do not intend these guidelines to be prohibitive in practice. Indeed, when serious harm to a party or to the community cannot be avoided without either forbidding discovery altogether or curtailing communication between one of the litigants and his attorney regarding discovered materials, the court should issue such a protective order.[8] But, to reiterate, the court must be confident that the potential injury is substantial and cannot be prevented through the use of any device less restrictive of a party's access to his lawyer.

Applying the foregoing standards to the instant case,[9] we are compelled to conclude that the District Court abused its discretion in issuing the protective order requested by appellees. The first of the three *Halkin* criteria does seem to have been satisfied. Affidavits submitted by appellees, detailing the danger of retaliation to which they would be exposed if persons inside the prison learned of allegations they made in the course of discovery, were more than sufficient to show that "substantial and serious harm" might well have resulted from dissemination of the information in question.[10] The second requirement also seems to have been satisfied. The order was limited to designated "areas of inquiry;"[11] and information or charges of the specific sorts identified likely would have provoked retribution if communicated to the incriminated parties. The third criterion, however, was not satisfied. The District Court could have formulated a decree that would have been equally effectual in preventing retaliation and would not have inhibited consultation between appellants and their attorneys. The possibility that springs most readily to mind is a ban on communication (concerning matters learned through discovery) between the defendant prison officials and any of the prison guards or inmates. Under these circumstances, it was error to issue the order.

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[8] Such orders have frequently been issued, under FED. R. CIV. P. 26(c)(7), to prevent disclosure to a party's business competitor(s) of "trade secret[s] or other confidential research, development, or commercial information." *See, e.g., Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234, 237 (S.D.N.Y.), *aff'd*, 573 F.2d 1288 (2d Cir. 1977); *Maritime Cinema Serv. Corp. v. Movies en Route, Inc.*, 60 F.R.D. 587, 590 (S.D.N.Y. 1973).

[9] Our analysis of the application of the legal standards proceeds on the assumption that the only significant effect of the protective order was to forbid disclosure of the discovered information to appellants by their counsel. *See* text at notes 4-5 *supra*. Though the order by its terms also proscribed dissemination of the information to the public, *see* note 3 *supra*, appellants have not contended that they had any interest in publicizing the facts revealed and allegations made by appellees. Accordingly, the test set forth in *Halkin* controls this case because the order restricted attorney-client consultation, not because it intruded upon interests shielded by the First Amendment.

Appellants insist that, having found an abuse of discretion in the issuance of the protective order, we need not determine whether they suffered any demonstrable prejudice thereby. An infringement of the right to consult with one's attorney, they claim, is so serious as to be grounds for reversal even in the absence of a showing of harm. We need not address this argument because the injury to appellants in the instant case was palpable. They were prevented, not only from conferring with their lawyers regarding how best to respond to appellees' allegations but even from checking their files for information relevant to the charges made. Such restrictions certainly impaired their ability to prepare their case. We conclude, therefore, that the trial was tainted by the overly broad order and that, consequently, the verdict must be vacated.

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[10] *See* Affidavit of Jeffrey Jackson, ¶ 10, App. 173; Affidavit of Deborah Jones, ¶ 12, App. 178.

[11] *See* note 3 *supra*.

II. THE ABSENCE OF A RESPONDEAT SUPERIOR INSTRUCTION

It is now established that local governing bodies may not be held liable, solely on the basis of a *respondeat superior* theory, for constitutional torts committed by their employees.[12] Some of the testimony presented at trial and a portion of appellees' counsel's closing argument might have been interpreted by the jury as implying that the District of Columbia was legally responsible for the consequences of unauthorized actions of individual prison guards.[13] The trial judge did not give the jury an instruction foreclosing such an interpretation. That omission was error.

III. THE INSTRUCTION ON THE INTERMINGLING OF INMATES

In the course of her instructions regarding whether the level of violence at Maximum violated the Eighth Amendment, the trial judge told the jury that they might consider the adequacy of the prison's system for classifying and segregating prisoners and, more specifically, the fact that "inmates who have participated in or have the potential for committing violence are placed in separate tiers of the same cellblock with prisoners who have been attacked or are particularly vulnerable to attack." App. 140. This instruction was factually accurate but somewhat misleading, insofar as it implied that the proximity of the two groups endangered the weaker prisoners, while the evidence supporting that inference was meager.[14]

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[12] *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978) (suit brought under 42 U.S.C. § 1983 (Supp. IV 1980)); *Tarpley v. Greene*, 684 F.2d 1, 9-11 (D.C. Cir. 1982) (suit brought directly under the Constitution).

[13] *See, e.g.*, Transcript ("Tr.") 747, 749, 751-52, 757-58, 760, 761 (elicitation of admissions of "procedural violations" by guards); Tr. 1143 (counsel's ambiguous argument concerning the legal significance of such violations).

The prejudice suffered by appellants as a result of either this or the foregoing mistake on the part of the trial judge does not appear to have been substantial. Were these the only flaws in the proceedings below, we might be inclined to discount them as harmless error. But, because we have concluded that the abuse of discretion in issuing the protective order dooms the verdict, we need not speculate regarding the actual impact of the flaws in the instructions relating to permissible theories of liability and the intermingling of prisoners. However, we of course expect that these mistakes will be avoided in the new trial.

IV. DAMAGE AWARDS FOR THE IMPOSITION OF "CRUEL AND UNUSUAL PUNISHMENT"

The fourth and final defect in the proceedings below relates to a portion of the charge to the jury that reads as follows:

> If your verdict is for the plaintiffs, you must then proceed to determine the amount of damages.
>
> Damages or injury must be proved by the persons who seek to be compensated. Actual damages are imposed to compensate the plaintiffs for injuries they have actually sustained. You are not to award damages for any injuries the plaintiffs may have suffered unless plaintiffs establish by a preponderance of the

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[14] Indeed, appellees never disputed evidence presented at trial by appellants indicating that the gates between the two tiers were never opened. Tr. 633.

> evidence in the case that the injuries were proximately caused by the defendants' wrongful conduct.
>
> . . . .
>
> It is not necessary that actual physical injury be shown in order for plaintiffs to recover in this action. If you find that plaintiffs were caused to suffer discomfort, mental or emotional distress or any other actual damage, as a result of defendants' wrongful acts or omissions, they are entitled to recover damages to compensate them for those injuries.
>
> If you find that defendant [sic] deprived plaintiffs of their constitutional rights, you may award plaintiffs damages for that deprivation. There is no precise formula for calculating these damages. Nevertheless, although the value of the plaintiffs' constitutional rights is difficult to assess, it must be considered. Thus, if you find that defendants violated plaintiffs' constitutional rights, you should arrive at a damage figure based upon consideration of equity, reason and pragmatism.

App. 145-47. This and other language in the trial judge's charge makes it reasonably clear that the jury was not to award anything more than nominal damages to the plaintiffs in the absence of a showing of some actual injury. But the instruction does seem to leave open another possibility: if the jury concluded the plaintiffs had suffered actual harm, they might award damages to compensate them for (i) their physical injuries; (ii) their mental distress; *and* (iii) the intrinsic value of their constitutional rights—evaluated "upon consideration of equity, reason and pragmatism."

The legal standards against which such a charge must be measured are not altogether clear. Upon examination of the relevant case law, however, we are compelled to conclude that the permission granted the jury to compensate appellees for the value of their violated rights constituted reversible error.

Analysis of the applicable doctrine must begin with the opinion in *Carey v. Piphus*, 435 U.S. 247 (1978). The Supreme Court there held that

> the basic purpose of a [42 U.S.C.] § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights . . . . Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.

Id. at 254. The Court's opinion does include language suggesting that portions of its rulings are applicable only to damage awards for violations of procedural due process. *Id.* at 258-59, 264-65. But, fairly read, those comments relate only to the identification and measurement of the particular interests shielded by different constitutional provisions. As the language quoted above indicates, the Court meant to extend the basic "compensation principle" to *all* constitutional rights, substantive as well as procedural. It is disingenuous to suggest otherwise.[15] It is equally apparent that the Court intended to require, not just that plaintiffs demonstrate actual injury before they secure more than a nominal recovery, but that damage awards be *limited* to sums necessary to compensate plaintiffs for actual harm.[16]

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[15] For opinions seeking to explain away *Carey*'s adoption of the compensation principle, see *Halperin v. Kissinger*, 606 F.2d 1192, 1207 nn. 100-01 (D.C. Cir. 1979), *aff'd per curiam by an equally divided Court, in part, cert. dismissed, in part,* 452 U.S. 713 (1981); *Konczak v. Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979) (alternative holding), *cert. denied,* 444 U.S. 1016 (1980).

[16] Similar views are adopted in *Clappier v. Flynn*, 605 F.2d 519, 529 (10th Cir. 1979); *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied,* 439 U.S. 1118 (1979); *Atcherson v. Siebenmann*, 458 F. Supp. 526, 537 (S.D. Iowa 1978), *rev'd in part on other grounds and remanded,* 605 F.2d 1058 (8th Cir. 1979).

By its terms, *Carey* explicitly governs only suits brought under 42 U.S.C. § 1983. But it would be difficult to defend a refusal to extend the holding of the case to suits brought directly under the Constitution—so-called *Bivens* actions.[17] The bodies of law relating to the two forms of litigation have been assimilated in most other respects.[18] Although the Court in *Carey* justified its decision partly on the basis of the legislative history of section 1983,[19] which of course is not applicable to suits brought under the Constitution, other aspects of its rationale are equally pertinent to *Bivens* actions. Certainly the general assertion that constitutional rights protect particular interests and are to be valued solely by reference to those interests is transferrable to the *Bivens* context. And the problems associated with leaving juries free to guess at the "inherent value" of constitutional rights are equally germane to the two kinds of suits.[20]

How, then, do these principles bear upon a suit challenging prison conditions on the basis of the Eighth Amendment? The Supreme Court instructs us that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question . . . ." *Carey v. Piphus*, 435 U.S. at 259. In applying that injunction to suits like the one at bar, we must remember that we are dealing with prisoners, who in most instances are persons who have been convicted of committing serious crimes. As the Supreme Court has observed in a different context:

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[17] The reference is to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Jurisdiction in such suits is predicated on 28 U.S.C § 1331 (Supp. IV 1980).

[18] *See, e.g., Butz v. Economou*, 438 U.S. 478, 498-504 (1978) (same "qualified immunity" rules); *Tarpley v. Greene*, 684 F.2d at 9-11 (same rules concerning theories of liability to which municipalities are exposed); *Paton v. LaPrade*, 524 F.2d 862, 871 (3d Cir. 1975) (same standards for determining compensable injuries).

[19] 435 U.S. at 255-57.

[20] *Cf.* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 Harv. L. Rev. 966 (1980), which argues vigorously for delimitation of the Carey principle but acknowledges that valuation of constitutional rights on any other basis would be difficult and that any judicial constraints on the measurement process would be, at best, problematic, *id.* at 988-90.

> [W]e have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. . . .
>
> But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Bell v. Wolfish, 441 U.S. 520, 545-46 (1979) (citations omitted) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

With these admonitions in mind, it is fair to conclude that the interests of prisoners shielded by the ban on "cruel and unusual punishment" correspond reasonably closely to the interests protected by analogous common-law tort rules.[21] *See Carey v. Piphus*, 435 U.S. at 257-58. Specifically, it would appear that prisoners may recover for the infringement of three interests: (i) bodily integrity; (ii) peace of mind;[22] and (iii) earning capacity.[23] In other words, plaintiffs are entitled to compensation for any physical injuries, pain and suffering, emotional distress,[24] and impairment of their prospects for future employment proximately caused by the defendants' unconstitutional conduct.

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[21] Note that the analogies drawn are not limited to measures of recovery associated with the tort of false imprisonment but extend to damage theories relating to the more general categories of intentional and negligent harm. *Cf. Clappier v. Flynn*, 605 F.2d at 529 ("The interest protected by the common law of negligence . . . parallels closely the interest protected by the Eighth Amendment . . . .").

In considering these questions, it is well to keep in mind that the Supreme Court has often observed that constitutional tort actions—both of the section 1983 and of the *Bivens* variety—have an important deterrent function. *See Carlson v. Green*, 446 U.S. 14, 21, 24-25 (1980); *Butz v. Economou*, 438 U.S. 478, 505 (1978).[25]

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[22] See RESTATEMENT (SECOND) OF TORTS §§ 46, 905(b) (1977).

In *Carey*, the Supreme Court went out of its way to sanction the award of compensation for emotional harm—on the condition that the plaintiff provides evidence thereof. 435 U.S. at 263-64 & n.20.

[23] *See* RESTATEMENT (SECOND) OF TORTS § 906(b) (1977).

While it must be acknowledged that there is no constitutional right to rehabilitation, *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981), it would seem equally clear that prisoners have a right not to be subjected to conditions (apart from the reasonable incidents of incarceration itself) that *reduce* their ability to earn a living and otherwise to conduct themselves in the world following their release.

[24] It may well be possible, in an appropriate case, to infer the infliction of emotional distress from the circumstances of the violation. *See Seaton v. Sky Realty Co.*, 491 F.2d 634, 637-38 (7th Cir. 1974). While the Court in *Carey* seemed to frown on such a mode of proof in the context of procedural due process, 435 U.S. at 263-64 & n.20, such inferences likely would be much more reliable when the plaintiff has been subjected to "cruel and unusual punishment."

[25] *See also* Note, *Damage Awards for Constitutional Torts*, *supra* note 20, at 980-81. The obstacles faced by a victim of unconstitutional conduct to securing judgment in his favor, as well as structural problems in the impact of such decisions,

While, as the Court has indicated, it is improper to award damages *merely* for the purpose of discouraging future constitutional violations by other governmental officials, protection of constitutional rights requires that compensation for actual injuries be adequate. As this court has said before:

> [I]n cases involving constitutional rights, compensation "should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *." Specifying such damages will always be difficult, but they must be at least "an amount which will assure [the plaintiff] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the courts."

Halperin v. Kissinger, 606 F.2d 1192, 1208 (D.C. Cir. 1979) (footnotes omitted) (quoting *Tatum v. Morton*, 562 F.2d 1279, 1282 (opinion for the court), 1287 (Wilkey, J., concurring) (D.C. Cir. 1977)), *aff'd per curiam by an equally divided Court, in part, cert. dismissed, in part*, 452 U.S. 713 (1981).

Unfortunately, the jury in the instant action was permitted to award more than liberal compensation for actual harm. They were also instructed to determine—and to award damages for—the intrinsic value of the plaintiffs' Eighth Amendment rights. The likelihood that they obeyed that instruction is sufficiently great to necessitate a new trial.

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may well make damage awards a less than ideal device for deterring future violations. *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 48-52 (1980). But the suggestion that, for deterrent purposes, we abandon damage awards entirely in favor of equitable relief, *id.*, ignores the utility of discouraging officials other than those involved in the case at bar from engaging in unconstitutional behavior.

V. CONCLUSION

For the foregoing reasons, the judgment is reversed and the awards of damages and equitable relief are vacated.[26] The case is remanded for a new trial in accordance with this opinion.

Separate statements will be filed by *Circuit Judge* MACKINNON and *Circuit Judge* EDWARDS sometime shortly after the issuance of the foregoing opinion for the court.

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[26] The District Court, on remand, will of course be free to consider the propriety of granting equitable relief, pursuant to FED. R. CIV. P. 65, pending the outcome of the new trial, that incorporates the terms of the original equitable decree.

Qualified immunity
See esp. p. 17 n. 16, p. 22

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1626

BERTRAM ZWEIBON, et al., APPELLANTS

v.

JOHN N. MITCHELL, individually and as Attorney General of the United States, et al.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 71-02025)

Argued November 22, 1982

Decided October 21, 1983

Nathan Lewin, with whom *Jamie S. Gorelick* was on the brief, for appellants.

Larry Lee Gregg, Attorney, Department of Justice, with whom *Stanley S. Harris*, United States Attorney, and *Barbara L. Herwig*, Attorney, Department of Justice, were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: EDWARDS, *Circuit Judge*, MACKINNON, *Senior Circuit Judge*, and SWYGERT,* *Senior Circuit Judge*, United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

Dissenting opinion filed by *Senior Circuit Judge* SWYGERT.

MACKINNON, *Senior Circuit Judge*: This is our fourth foray into this protracted litigation. Past history notwithstanding, this decision should dispose of the matter.

Appellants, members of the Jewish Defense League (JDL), brought this action in 1971 against John N. Mitchell,[1] who as Attorney General authorized warrantless electronic surveillance of the JDL during 1970 and 1971. Appellants now challenge the district court's order, entered after our third remand, which dismissed their complaint pursuant to Fed. R. Civ. P. 37(b) for their refusal to comply with deposition notices. Because we find that Mitchell is entitled to qualified immunity under the Supreme Court's recent decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), we affirm the decision of the district court without reaching the question whether dismissal was an appropriate sanction.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Nine special agents of the Federal Bureau of Investigation were also named as defendants, but they were dismissed from the case in earlier proceedings and are not parties to this appeal. *See* Record of Status Call at 3 (Dec. 1, 1981) (IV App. 68). [References to the Joint Appendix filed with the briefs in this appeal are designated as "IV App." to distinguish that volume from appendices, also referred to herein (*e.g.*, "III App."), which were filed on previous appeals in this case.] For clarity, we refer to Mitchell throughout this opinion as the sole defendant to this action.

I. FACTUAL BACKGROUND

The facts of this case need only be sketched here, as they are set out in exhaustive detail in our opinion in *Zweibon v. Mitchell* (*Zweibon I*), 516 F.2d at 594 (D.C. Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976). In 1970 and 1971, the telephones of the JDL were tapped by the FBI, which acted without a warrant under a specific directive from Mitchell.[2] Mitchell, in turn, had responded to official requests for such authorization from J. Edgar Hoover, who adverted to Soviet complaints about sometimes violent JDL demonstrations against Soviet personnel and installations in New York.[3] Electronic surveillance was sought in order to forestall deterioration in American-Soviet relations and to avoid threatened retaliation against American citizens in Russia. *See id.* at 608-09 & nn.20-23; *Zweibon v. Mitchell,* 363 F. Supp. 936, 939-42 (D.D.C. 1973). Against the advice of his legal counselors,[4] Mitchell authorized the warrantless taps on September 15, 1970.[5]

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[2] A preexisting Presidential directive expressly delegated to the Attorney General responsibility and authority for exercising the President's putative authority to approve warrantless electronic surveillance in national security cases. *See* President Johnson's Memorandum for the Heads of Executive Departments and Agencies (June 30, 1965), *reproduced at Zweibon I,* 516 F.2d at 674-75, app. A.

[3] Hoover's memorandum is discussed in our opinion in *Zweibon I,* 516 F.2d at 609 n.24.

[4] *See* Memorandum from Assistant Attorney General J. Walter Yeagley, Internal Security Division, to the Attorney General at 4-5 (Apr. 1, 1969) (IV App. 20-21); Memorandum from the Solicitor General to the Attorney General at 7-8 (Apr. 3, 1969) (IV App. 28-29); Memorandum from the Solicitor General to the Attorney General at 2-5 (Apr. 7, 1969) (IV App. 35-38). *But see* Memorandum from Assistant Attorney General Will Wilson, Criminal Division, to the Attorney General at 1 (Apr. 15, 1969) (IV App. 40) (urging, without legal analysis, that "wiretaps involving . . . dangerous and violent internal subversion" be defended as constitutional).

[5] Mitchell's signed approval, dated September 15, 1970, was affixed to the bottom of Hoover's memorandum requesting

The first wiretap was in place during the month of October 1970. *Zweibon I*, 516 F.2d at 609. The volume of JDL protests increased during the last two months of 1970, and on January 4, 1971, Mitchell approved an official FBI request for authority to reinstitute surveillance for a period of 90 days. *Id.* at 609-10. Authority was extended for another 90 days on March 31, 1971. *See* Memorandum from J. Edgar Hoover to the Attorney General (Mar. 31, 1971) (III App. 72).

On May 12, 1971, indictments were returned against a number of JDL members—including five of the appellants in this action—on federal charges under the Gun Control Act of 1968.[6] Prosecutors disclosed the existence of the taps on June 18, 1971, during pretrial proceedings in two consolidated criminal cases stemming from the indictments.[7] In apparent violation of Mitchell's own directive against overhearing conversations of a federal criminal defendant or his attorney,[8] the taps continued after indictment and even after their disclosure by the prosecution.[9] There is, however, no evidence to suggest that

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the authorization. Memorandum from J. Edgar Hoover to the Attorney General at 2 (Sept. 14, 1969) (III App. 69).

[6] Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified at scattered sections of Titles 18 and 26 U.S.C.).

[7] These criminal cases are United States v. Bieber, No. 71-CR-479 (E.D.N.Y.), and United States v. Joffe, No. 71-CR-480 (E.D.N.Y.). The pretrial hearing is unreported. *Zweibon I*, 516 F.2d at 607 n.15.

[8] In a letter dated July 14, 1969, Mitchell had prohibited the overhearing of conversations of a federal criminal defendant or his attorney. *See Zweibon I*, 516 F.2d at 611 & n.34; Memorandum from J. Edgar Hoover to the Attorney General at 2 (Jan. 4, 1971) (III App. 71). Bertram Zweibon, who is lead plaintiff in this action, was a counsel of record in the criminal proceedings. *Zweibon I*, 516 F.2d at 611 n.33.

[9] Indictments were returned on May 12; the taps were revealed on June 18; and the surveillance was terminated on July 3. *See Zweibon I*, 516 F.2d at 605 n.10, 610 n.31.

Mitchell knew surveillance had not been terminated upon indictment as he had previously directed.[10] *See Zweibon I*, 516 F.2d at 610-11 & n.34.

II. PROCEDURAL HISTORY

Shortly after the surveillance was revealed, appellants filed this action for damages allegedly flowing from the overhearings. The taps were alleged to have violated appellants' rights under both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976). The action was promptly stayed pending the Supreme Court's decision in *United States v. United States District Court* (*Keith*), 407 U.S. 297 (1972). On June 19, 1972, the Supreme Court decided *Keith*, holding that there exists no exception from the warrant requirement for surveillance justified solely on the basis of *domestic* threats to the national security. *Id.* at 321. The Court expressly left open, however, "the issues which may be involved with respect to activities of foreign powers or their agents," *id.* at 322 (footnote omitted), and it did not articulate precise definitions of "domestic" and "foreign" threats to national security. *See id.* at 309 n.8.

A year later, the district court granted Mitchell's motion for summary judgment. 363 F. Supp. 936 (D.D.C. 1973). The court distinguished *Keith* as "dealing only with the domestic aspects of our national security," *id.* at 943, and concluded that warrantless surveillance of the JDL was a lawful "exercise of the President's constitutional authority to conduct the nation's foreign relations and his power to protect the national security." *Id.* at 942. The court also ruled that Title III of the Omnibus Crime Control and Safe Streets Act did not address itself to "national security surveillances" that have "foreign aspects." *Id.* at 943.

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[10] In fact, Hoover's memorandum seeking the first 90-day authorization concluded with an express assurance that the requested "monitoring [would] be conducted in accordance with the instructions set forth in your letter of July 14, 1969, entitled 'Electronic Surveillances.'" Memorandum from J. Edgar Hoover to the Attorney General at 2 (Jan. 4, 1971) (III App. 71). Mitchell approved the request by signing immediately below this assertion. *Id.*

This court, sitting *en banc*, reversed. *Zweibon I*, 516 F.2d 594 (1975). Although all eight judges found the wiretaps to be illegal, the appeal spawned six separate opinions on the constitutional and statutory issues.[11] We remanded for consideration of affirmative defenses not yet reached by the district court.

On remand appellants filed a demand for a jury trial on the remaining issues. The district court struck the demand (*see* III App. 193), apparently on the ground that it was untimely. *See* Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial (III App. 192). Upon appellants' subsequent petition for mandamus, we concluded that appellants had not waived their right to demand a jury trial on the affirmative defense of good faith immunity. *In re Zweibon* (*Zweibon II*), 565 F.2d 742 (D.C. Cir. 1977) (per curiam).

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[11] A plurality of the court joined Judge Wright's opinion, which found violations of both the Fourth Amendment and Title III. *Zweibon I*, 516 F.2d at 604-73 (plurality opinion). Judges McGowan and Robb filed concurring opinions; they found it unnecessary to reach the constitutional questions because they deemed the taps to be violative of Title III. *Id.* at 681-87 (McGowan, J., concurring in the judgment); *id.* at 688-89 (Robb, J., concurring). Judges MacKinnon and Wilkey filed opinions concurring in part and dissenting in part; both concluded that the JDL surveillance violated appellants' rights under the Fourth Amendment, but rejected the other judges' finding that Title III had also been contravened. *Id.* at 689-706 (Wilkey, J., concurring and dissenting); *id.* at 706-07 (MacKinnon, J., concurring in part and dissenting in part). Finally, while concurring in the plurality's disposition of the statutory and constitutional questions, Judge Bazelon wrote separately to disapprove the court's decision to permit Mitchell to raise certain affirmative defenses on remand. *Id.* at 675-81 (Bazelon, J., concurring in part, dissenting in part).

While the mandamus petition was pending, Mitchell revived his motion for summary judgment. *See* Defendants' Renewed Motion for Summary Judgment (III App. 348). He argued that the decisions in *Keith* and *Zweibon I* should not be given retroactive application to either the statutory or the constitutional claims. The district court agreed and granted his renewed motion for summary judgment. *Zweibon v. Mitchell*, 444 F. Supp. 1296, 1298-1300 (D.D.C. 1978).

We again reversed. *Zweibon v. Mitchell* (*Zweibon III*), 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981). While agreeing with the district court that our application in *Zweibon I* of Title III to unconstitutional national security surveillance "represented a sharp break in the law which should be restricted to prospective effect," *id.* at 1182, we found that equitable considerations weighed in favor of applying *Keith* and *Zweibon I* retroactively to the constitutional claims. *Id.* at 1177-81. Despite the existence of contradictory lower court rulings, we rejected Mitchell's claim that the outcome in *Keith* and *Zweibon I* was not clearly foreshadowed. *Id.* at 1179. However, we observed that while

> [c]ontradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, . . . *such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.*

Id. at 1181 n.49 (emphasis added). We explictly noted that any concerns we might entertain for the fairness of retroactivity in this case were allayed by the potential availability of the good faith immunity defense. *See id.* at 1180-82 & nn.49-50. Accordingly, we again remanded for consideration of Mitchell's good faith defense.

On the third remand, the district court held a status conference. At that time, counsel for Mitchell was permitted, with the qualified consent of appellants, *see* note 13 *infra*, to proceed with discovery. Record of Status Call, *supra* note 1, at 13 (IV App. 78). Counsel advised that paper and deposition discovery would be sought, with a view to filing a new motion for summary judgment based on an expanded record following the disposition of *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982), which had just been argued before the Supreme Court.[12] *See* Record of Status Call, *supra* note 1, at 5-8, 12 (IV App. 70-73, 77). In particular, counsel declared his intention to depose all the appellants.[13] *Id.* at 10 (IV App. 75). Counsel for appellants objected to these proposed depositions as burdensome and unnecessary, but the court refused to circumscribe appellee's discovery at that time. *Id.* at 12-13 (IV App. 77-78).

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[12] In *Zweibon III*, this court incorporated the opinion issued the same day in Halperin v. Kissinger, 606 F.2d 1192, 1208-10 (D.C. Cir. 1979), as a basis for rejecting Mitchell's claim that he was entitled to absolute or qualified immunity as a matter of law. He was left to pursue on remand a qualified immunity defense grounded on subjective and objective criteria. *Zweibon III*, 606 F.2d at 1181. The Supreme Court was unable to resolve the immunity issues in *Halperin,* which was affirmed by an equally divided Court. 452 U.S. 713 (1981). Subsequently, writs of certiorari were granted in Nixon v. Fitzgerald, 452 U.S. 959 (1981), and Harlow v. Fitzgerald, 452 U.S. 959 (1981), which presented similar immunity issues.

[13] Counsel for Mitchell also announced an intention to depose nonparties in order to corroborate Mitchell's recollection of events surrounding his approvals of the JDL surveillance. Record of Status Call, *supra* note 1, at 8-9 (IV App. 73-74). It was to these depositions that appellants acceded, *id.* at 6 (IV App. 71), but no such depositions were ever noticed. Counsel for Mitchell also described his intention to depose all the appellants as "tentative," depending on the quality of responses he obtained from paper discovery. *Id.* at 10 (IV App. 75). Nonetheless, appellee noticed depositions of all appellants *before* he served them with interrogatories and requests for admissions. *See* Docket Entries at 6-8 (IV App. 11-12). Depositions were noticed for every working day between February 17 and March 17, 1982, a schedule even appellee characterizes as "intensive." Brief for Appellee at 13.

During December 1981, deposition notices, interrogatories, and requests for admissions were served on all appellants. Docket Entries at 6-8 (IV App. 11-13). Appellants responded to the paper discovery but moved for a protective order quashing the notices of deposition. Motion for Protective Order (IV App. 54). Appellants contended that the proposed schedule was too intensive and the information sought by appellee was irrelevant to the remaining issues in the case. *See* Memorandum in Support of Plaintiffs' Motion for Protective Order (IV App. 55-65). Mitchell responded by arguing, *inter alia,* that depositions aimed at revealing the "true nature" of appellants' conduct with respect to Soviet installations might be relevant to the objective reasonableness of his decision to authorize the surveillance. *See* Defendant's Opposition to Plaintiffs' Motion for a Protective Order at 5-6 (IV App. 113-14). Mitchell also contended that depositions might elicit evidence relevant to the calculation of damages, as to which he believed appellants' own conduct might be presented to the jury in mitigation of damages or to preclude punitive damages. *Id.* at 6 (IV App. 114).

The district court denied appellants' motion for a protective order. Order of April 23, 1982 (IV App. 123). Appellants promptly filed a motion for reconsideration, in which they offered to *stipulate* that Mitchell could reasonably have believed reports he had received on JDL activities. Plaintiffs' Motion for Reconsideration of Order Denying Motion for Protective Order at 2, 3-4 (IV App. 125, 126-27). Appellants also "respectfully advise[d] the Court that they [would] not comply with defendant's request for these irrelevant depositions." *Id.* at 3 (IV App. 126).

Subsequently, at a hearing on the motion for reconsideration, counsel for appellants offered to make *one* appellant available so that the court could better assess the relevance of such testimony. Transcript of Hearing of April 5, 1982, at 3-5, 16 (IV App. 154-56, 167). Counsel also offered not to seek "special" damages, but declined to limit appellants' claim to one for nominal damages. *Id.* at 4-9 (IV App. 154-60). Appellants reiterated their intention to refuse to comply with notices of deposition. *Id.* at 5 (IV App. 156). The district court announced from the bench its decision to dismiss the complaint as a sanction pursuant to Fed. R. Civ. P. 37(b) for appellants' refusal to submit to depositions. *Id.* at 19 (IV App. 170). The final judgment and findings of fact and conclusions of law were entered on May 14, 1982. (IV App. 171-76). This appeal followed.

III. Issues on Appeal

As previously noted, we find it unnecessary to decide whether the district court should have granted appellants' request for a protective order and, if not, whether dismissal was an appropriate sanction for their refusal to comply with notices of deposition. We find Mitchell entitled to summary judgment as a matter of law on the issue of qualified immunity under principles recently enunciated in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982).

While the district court has not yet considered this defense, a reviewing court may rest its affirmance on any ground for which the record is sufficient to permit the necessary findings of fact and law. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Lew v. Suffridge*, 370 F.2d 487, 488 & n.1 (D.C. Cir. 1966). Appellants do not question the sufficiency of the record as a basis for resolving the defense; indeed, appellants insist that "discovery in this case had been completed before the district court entered summary judgment in 1978."[14] Brief for

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[14] Even if discovery had not been completed, the record would be sufficient to adjudicate Mitchell's qualified immunity

Appellants at 16. Moreover, the parties have briefed and argued the qualified immunity defense before this court.[15] Given the Supreme Court's admonition that insubstantial claims against government officials should not proceed to trial, *Harlow v. Fitzgerald, supra,* 102 S. Ct. at 2727 (citing *Butz v. Economou,* 438 U.S. 478, 507-08 (1978)), we would be remiss in our appellate duty were we to order yet another remand to resolve what is a purely legal threshold question. *See, e.g., Ellsberg v. Mitchell,*

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claim. In *Harlow,* the Supreme Court characterized the defense as a "threshold immunity question" before the resolution of which discovery should not be allowed. 102 S. Ct. at 2739.

[15] Appellants anticipated and addressed the immunity issues in their opening brief—*before* Mitchell had formally raised the issue in his brief on this appeal. Such anticipation was hardly prophetic, given the tenor of the Supreme Court's *Harlow* decision and defense counsel's previously stated intention to file a new motion for summary judgment once *Harlow* had been decided. *See* Record of Status Call, *supra* note 1, at 5-8, 12 (IV App. 70-73, 77).

Mitchell also argues that as Attorney General he is entitled to absolute immunity from actions for damages arising out of national security electronic surveillance. *See Harlow v. Fitzgerald, supra,* 102 S. Ct. at 2736 & n.18 (dictum). We find it unnecessary to reach this issue, since, as we hold below, Mitchell is clearly entitled to qualified immunity. We deem it prudent to defer the question until we are faced with a situation in which an Attorney General has trampled on unquestioned constitutional or statutory rights in the name of "national security." The careful balancing of competing values that inhere in immunity analysis—the public interest in encouraging the vigorous exercise of official authority and the importance of a damages remedy for the vindication of constitutional guarantees, *id.* at 2733; *Butz v. Economou, supra,* 438 U.S. at 504-06—should not be attempted until the accommodation of those values can be tested in a concrete factual setting. We decline, therefore, the invitation to reach out and resolve in dicta this important and difficult question. *See Ellsberg v. Mitchell, supra,* slip op. at 1 n.1 (MacKinnon, J., concurring in part and dissenting in part).

No. 82-1085, slip op. at 5-7 (D.C. Cir. May 10, 1983) (MacKinnon, J., concurring in part and dissenting in part); *Hall v. United States*, 704 F.2d 246, 249-51 (6th Cir. Mar. 25, 1983); *Silverman v. Ballantine*, 694 F.2d 1091, 1096 (7th Cir. 1982); *Wolfel v. Sanborn*, 691 F.2d 270, 272 (6th Cir. 1982) (per curiam) (Weick, J., dissenting), *cert. denied*, 103 S. Ct. 751 (1983).

A. *The* Harlow *Standard*

Before *Harlow*, qualified immunity was denied an official who

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [complainant] or if [the official] took the action with malicious intention to cause a deprivation of constitutional rights or other injury.

Wood v. Strickland, 420 U.S. 308, 320 (1975). The old test thus had objective and subjective elements: immunity was available only if the official had neither violated clearly established law nor acted out of malice. *See, e.g., Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Aware that denying absolute immunity to officials might subject them to harassing civil litigation, the Court admonished judges quickly to weed out frivolous claims through firm application of the Federal Rules of Civil Procedure. *Butz v. Economou, supra*, 438 U.S. at 507-08; *see Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part).

The Court discovered, however, that questions of subjective intent are rarely amenable to resolution on motions for summary judgment and that the broad-ranging discovery which resulted could often be disruptive of effective government. *Harlow v. Fitzgerald, supra*, 102 S. Ct. at 2737. Accordingly, the Court in *Harlow* made an "adjustment" of the standard for qualified immunity by severing the subjective element from the defense. *Id.*

at 2737-39. Concluding that "bare allegations of malice" should not be sufficient to subject officials to the burdens of trial and discovery, the Court held that government officials

> generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 2737 (citing *Procunier v. Navarette, supra,* 434 U.S. at 565; *Wood v. Strickland, supra,* 420 U.S. at 321). Thus, once the trial judge determines that the law was not clearly established at the time the contested conduct occurred, the inquiry ceases. *Id.* at 2738-39. At that point the official is entitled to summary judgment as a matter of law, and "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 2739.

B. *The Test Applied*

Our task after *Harlow,* therefore, is to measure Mitchell's conduct by reference to clearly established law at the time these wiretaps were authorized. The precise contours of what constitutes "clearly established law" for immunity purposes are difficult to delimit, and the Supreme Court has offered little guidance in this regard. *See id.* at 2738 n.32 ("As in *Procunier v. Navarette,* 434 U.S. 555, 565 (1978), we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the Local District Court.' "). We too are spared that Herculean labor, since we conclude that the illegality of Mitchell's conduct was not "clearly established" by any reasonable definition of the phrase.

As noted above, *see* pages 4-5 *supra,* the Supreme Court issued no pronouncement on the legality of warrantless domestic national security surveillance until a year *after* the JDL wiretaps had been terminated. Even then, in declaring such searches illegal, the Court declined to articulate a crisp distinction between "foreign" and "domestic" threats to national security. *See Keith, supra,* 407 U.S. at 309 n.8. It is not surprising, therefore, that the district court should have reached one conclusion as to the legality of the JDL taps and that this court should have expended six separate opinions and over one hundred pages of analysis to reverse that conclusion. As appellee points out, a reading of *Zweibon I* alone "bel[ies] any suggestion that the Court was confronted with a simple issue automatically controlled by earlier decisions." Brief for Appellee at 61. Indeed, we observed in *Zweibon I* that this case "involve[s] the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for further disposition." 516 F.2d at 652; *see Keith, supra,* 407 U.S. at 309 n.8, 321-22.

Moreover, we recently had occasion in *Sinclair v. Kleindienst,* 645 F.2d 1080 (D.C. Cir. 1981), to consider whether factually similar warrantless surveillances violated clearly established law. *Sinclair* involved alleged constitutional violations stemming, in part, from the very surveillance which culminated in the *Keith* decision. The FBI had maintained wiretaps on the Black Panther and White Panther parties between February 1969 and January 1971. *Id.* at 1081. As in the present case, the government unsuccessfully asserted that warrants were unnecessary because the taps were aimed at collecting information necessary to protect the nation's internal security. After the *Keith* Court spurned that assertion, plaintiffs brought an action for damages against Mitchell and other officials. The district court granted summary judgment in favor of Mitchell on the issue of qualified immunity. *Id.* at 1082-83.

We affirmed the decision regarding immunity. *Id.* at 1084-85. Observing that the Supreme Court had expressly reserved ruling on the legality of warrantless national security surveillances in *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967), we noted that the only federal courts that had addressed the issue at the time the wiretaps were in place had concluded that warrants were unnecessary. *Sinclair v. Kleindienst, supra*, 645 F.2d at 1084 (citing *United States v. Stone*, 305 F. Supp. 75 (D.D.C. 1969); *United States v. O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969)). As a result, we held that for purposes of qualified immunity Mitchell had entertained a reasonable belief in the legality of his conduct. *Sinclair v. Kleindienst, supra*, 645 F.2d at 1084-85 (citing *Chagnon v. Bell*, 642 F.2d 1248, 1258 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981)).

Our decision in *Sinclair* controls the disposition of this appeal. If there was no clearly established warrant requirement as of January 1971 (the date of the last surveillance in *Sinclair*), it follows that there was no such requirement as of March 31, 1971 (the date Mitchell authorized the last series of JDL surveillances), or even as late as July 3, 1971 (the date the surveillance was finally terminated). *See* note 9 *supra*.

We also acknowledged in *Sinclair* that there "was no judicially imposed reasonableness requirement for national security wiretaps at the time," *id.* at 1082, and that the minimization procedures Mitchell himself had prescribed, *see* note 8 *supra*, "predated any judicial requirement for them in national security surveillance." 645 F.2d at 1085. Similarly, in *Chagnon v. Bell, supra*, we noted that even in its 1972 *Keith* opinion the Supreme Court had "declined to delineate 'precise standards for domestic security warrants' " and instead had invited Congress to articulate them. 642 F.2d at 1262 (quoting *Keith, supra*, 407 U.S. at 323). It is plain, therefore, that there existed no clearly established warrant or reasonableness requirements at the time Mitchell authorized the JDL surveillance.

Undaunted, appellants proffer three "critical" bases for distinguishing *Sinclair*—a decision they do not even deign to cite in their opening brief. None of the bases is "critical."

First, appellants maintain that, even if it had been reasonable to conclude in 1970 that no warrant was required to eavesdrop on the Black Panther Party—which threatened violent overthrow of the government and maintained some contact with foreign governments—it was not similarly reasonable to conclude that it was lawful to conduct warrantless surveillance of the JDL—a domestic group "which posed no threat to our own government and did not act in concert with a foreign power." Appellants' Reply Brief at 13. That such a slender distinction is not "critical" seems self-evident, especially in light of the complex arguments and sharp differences of opinion that characterized our various analyses of the Fourth Amendment claims in *Zweibon I*. *See* note 11 *supra*. Even in *Keith*, the Supreme Court declined to elaborate on the incidents of "foreign" versus "domestic" surveillances. 407 U.S. at 309 n.8. Consequently, we refused to follow precisely this route in *Zweibon I*:

> *Although appellants contend and appellees admit that the JDL is a domestic organization with no Russian connection, that fact does not mean that appellants are correct in their assertion that the warrantless surveillance here is automatically unlawful.* In *Keith*, "[t]here was no evidence of any involvement, directly or indirectly, of a foreign power." Here, by contrast, while there is no collaboration between the JDL and Russia—quite the reverse—JDL's activities did involve Russia in a confrontation with the United States. Thus this case does indeed involve the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for future disposition. Although the type of involvement here was not anticipated in *Keith*, there is no indication that *Keith* intended to limit "involvement" to collaboration with

> a foreign power. Collaboration simply was the most obvious example of how a domestic organization could become involved in the foreign affairs of this country.[189]
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> [189] *See* 407 U.S. at 309 n.8, 80 S.Ct. 2125. For example, if the defendant in *Keith* had been financed by a foreign power, the Court would have treated the case as involving the foreign aspects of our national security even though the foreign power had itself taken no overt action against this country. *In our case, since the threat to national security emanated from Russia, there is no question that the President's foreign affairs powers must be considered in our decision whether the surveillance was lawful.*

516 F.2d at 652 & n.189 (footnotes omitted) (emphasis added). A public official should not be made to guess, at his peril, whether distinctions as rarefied as those appellants proffer might one day subject him to personal liability for his official acts. Such a crabbed immunity defense "would dampen the ardor of all but the most resolute." *Gregorie v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (L. Hand, J.).

Second, appellants contend that contemporaneous internal Department of Justice memoranda written for Mitchell demonstrate that such distinctions were "understood by advisors to this defendant." Appellants' Reply Brief at 13; *see* note 4 *supra*. The short answer to this argument is that it is irrelevant after *Harlow*. It goes only to Mitchell's subjective good faith, an element now shorn from the defense of qualified immunity. *See Harlow v. Fitzgerald, supra*, 102 S.Ct. at 2738 (limits of qualified immunity defined "essentially in objective terms"). Furthermore, because "discovery should not be allowed" until the "threshold immunity question is resolved," *id.*, we are reticent to allow appellants to benefit from the fruits of discovery that took place before *Harlow* was decided.[16] Finally, our reading of the internal memoranda discloses that they make predictions as to future action by the Supreme Court and discuss strategic considerations for potential litigation; the memoranda do not purport to declare what was then legally permissible conduct with respect to warrantless national security surveillance.

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[16] We would not have our opinion read to excuse the extraordinarily sly violator "who *actually knows* that he was violat-

Third, appellants would distinguish *Sinclair* on the ground that, by the time Mitchell renewed his second wiretap authorization in this case, two lower courts had found warrantless wiretaps to be improper when directed at domestic groups. Appellant's Reply Brief at 13; *see* Brief for Appellant at 36; *accord Forsyth v. Kleindienst*, 551 F. Supp. 1247, 1255 (E.D. Pa. 1982), *proceedings stayed pending appeal*, 700 F.2d 104 (3d Cir. 1983). It is true that two district courts had so ruled less than three months before Mitchell's March 3, 1971 authorization. *See United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. Jan. 26, 1971); *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. Jan. 8, 1971). We allow to pass unremarked the exiguous amount of time—roughly two-and-a-half months—appellants apparently would vouchsafe the Attorney General in which to evaluate, assimilate, and apply in a systematic fashion isolated lower court decisions that might bear on the Department's day-

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ing the law . . . , even if he could not 'reasonably have been expected' to know what he actually did know." *Harlow v. Fitzgerald, supra*, 102 S. Ct. at 2740 (Brennan, J., concurring) (emphasis in original). The Court's *Harlow* opinion appears to have been carefully crafted to avoid such an egregious, if doubtless rare, result. *See id.* at 2737 ("*bare allegations* should not suffice") (emphasis added); *id.* ("We therefore hold that government officials . . . *generally* are shielded from liability . . . insofar as their conduct does not violate clearly established statutory or constitutional rights . . . .") (emphasis added). We merely conclude that, whatever the wisdom of disregarding the advice of some of his advisors, Mitchell did not "actually know" that his conduct was illegal and that the memoranda cannot otherwise support an inference that his belief was *objectively* unreasonable.

to-day operations.[17] Even if timing were not a factor, we are loath to suggest that the Attorney General of the United States is bound by lone decisions by two local district judges. He occupies a national office, and hence his perspective must be national in scope—especially where national security considerations are implicated.

Moreover, these two decisions were not the only lower court decisions dealing with the putative national security exemption from the warrant requirement; they were merely the first cases to exclude surveillance of domestic organizations from the scope of that exemption. Mitchell could reasonably have relied on *other* lower court decisions in which warrantless national security surveillances were held permissible. *See, e.g., United States v. Butenko*, 318 F. Supp. 66 (D.N.J. 1970), *aff'd*, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974); *United States v. Brown*, 317 F. Supp. 531 (E.D. La. 1970), *appeal dismissed*, 456 F.2d 1112 (5th Cir. 1972) (per curiam), *aff'd*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *United States v. Dellinger*, No. 69 Cr. 180 (N.D. Ill. 1970) (III App. 356); *United States v. O'Neal*, Cr. No. KC Cr. 1204 (D. Kan. 1970); *United States v. Clay*, Cr. No. 6711-94 (S.D. Tex. 1969), *aff'd*, 430 F.2d 165 (5th Cir.), *rev'd on other grounds*, 403 U.S. 698 (1971).

Appellants rejoin that Mitchell should have distinguished all these cases. Thus, they suggest that *Dellinger* and *O'Neal* might have been distinguished on the ground that the criminal defendants in those cases were allegedly seeking the overthrow of the government. Brief for Appellant at 35-36. But neither the disclaiming footnote in *Katz*, nor Justice White's celebrated concurring opinion therein, purported to confine the open question to surveillances aimed only at efforts to overthrow the government. *See* 389 U.S. at 358 n.23; *id.* at 363-64 (White, J., concurring). Nor did *Katz* suggest that a "national security" exemption might excuse warrantless surveillance directed at foreign embassies (*Clay*, *Brown*) or at individuals allegedly engaged in foreign espionage (*Butenko*), but not surveillance aimed, as in the present case, at meeting threats to our foreign relations or to American diplomatic personnel abroad. We reiterate that even in *Keith* the Supreme Court did not draw the nice distinctions upon which appellants argue the personal liability of an Attorney General should turn.

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[17] We find it odd that appellants would charge Mitchell with a duty to apply, at his peril, a couple of lower court decisions to an ongoing surveillance while appellants themselves seek to impugn his reliance on United States v. O'Neal, Cr. No. KC Cr. 1204 (D. Kan. 1970), and United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970), on the ground that they "were decided after the initial wiretap authorizations." Brief for Appellants at 35.

Perhaps anticipating that efforts to distinguish *Sinclair v. Kleindienst* would be unpersuasive, appellants assail, without citing, the holding of *Sinclair* itself. To this end, appellants maintain that the "clearly established" test for immunity purposes is coterminous with the "clearly foreshadowed" test courts employ to determine whether a judicial decision ought to be given retroactive effect. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Accordingly, appellants conclude that our decision in *Zweibon III* giving retroactive effect to *Keith* and *Zweibon I* disposes of the immunity defense now that *Harlow* bars inquiry into subjective intent. Brief for Appellants at 24-27. In addition, by gathering scattered dicta from *Katz*, *Alderman v. United States*, 394 U.S. 165 (1969), and *Giordano v. United States*, 394 U.S. 310 (1969), appellants "poll" the Supreme Court Justices on the scope of the national security exemption as of 1970. Appellants come up with six Justices (including Justice Fortas) who had indicated their agreement with the proposition *Keith* eventually would establish. As a result, appellants conclude, the unlawfulness of the JDL surveillance was "clearly established" by prior decisions. *See* Brief for Appellants at 32-34.

Even ignoring the inherent difficulties and imprecision that must attend any "vote" based on statements made in other decisional contexts, appellants' "poll" proves nothing, since it applies a different test from that expounded in *Harlow*. The test for qualified immunity is "clearly established," not "clearly foreshadowed." The distinction is self-evident.

Appellants' attempt to pass off the two standards as coterminous receives no support from *Harlow* itself. Nowhere does the Court employ the phrase "clearly foreshadowed"; nor does the Court suggest that its standard bears any relationship to that for retroactivity. To the contrary, immediately after stating its new holding that officials are immune insofar as their conduct does not violate clearly established law, the Court makes clear that the *content* of the standard is identical to that for establishing the "objective" element of the old two-pronged test for qualified immunity. *See* 102 S. Ct. at 2737 (citing *Procunier v. Navarette, supra*, 434 U.S. at 565; *Wood v. Strickland, supra*, 420 U.S. at 321). Appellants concede that the *Harlow* test "remained . . . the same as had been defined in *Wood v. Strickland.*" Brief for Appellants at 25. The concession is telling, for the very pages in *Wood* to which appellants and the *Harlow* Court—direct us describe the objective standard as follows:

> [A]n act violating . . . constitutional rights can be no more justified by ignorance or disregard of *settled, indisputable law* . . . than by the presence of actual malice.
>
> [A school board member] must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the *basic, unquestioned constitutional rights* of his charges.

Wood v. Strickland, supra, 420 U.S. at 321, 322 (emphasis added). It is evident that language which speaks of "indisputable law" and "unquestioned rights" cannot be reconciled with the "clearly foreshadowed" test.

Moreover, our decision in *Zweibon III* evinces a clear understanding of the differences between the tests for retroactivity and immunity. In fact, we invoked those differences to allay any lingering concerns over the fairness of retroactivity:

> Our rejection of the claim that *Keith* and *Zweibon I* should only be applied prospectively because they were not clearly foreshadowed . . . should not be seen to undercut a claim of reasonable grounds for believing the legality of one's actions on the immunity issues. Contradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, but such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.

Zweibon III, 606 F.2d at 1181 n.49. *See also id.* at 1181 n.50 ("[W]e believe that because qualified immunity protects potential defendants acting in good faith and in accordance with a reasonable understanding of applicable law, equitable considerations favor retroactivity to provide compensation for constitutional injury."). The two tests, therefore, are not coterminous.

We are not unmindful of the consequences that might attend a too niggardly definition of what constitutes "clearly established" law. Attorneys General are lawyers, after all—often good ones—and every first-year law student learns how to distinguish cases which on first blush seem squarely on point. But the distinctions between Mitchell's conduct here and that condemned in *Katz* or even *Keith* are real and substantial. Mitchell could reasonably have relied on those distinctions in authorizing the JDL wiretaps. Nothing in our opinion today should be read to suggest that impermissible conduct may be excused by the drawing of trivial factual distinctions.

IV. CONCLUSION

Having carefully considered the record and all of appellants' arguments,[18] we find that Mitchell is entitled to summary judgment as a matter of law on the question of qualified immunity. Therefore, the decision of the district court is affirmed.[19]

Judgment accordingly.

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[18] Two other issues raised by appellants may be disposed of in cursory fashion. First, appellants contend that if the JDL wiretaps constitute "a 'good faith' surveillance undertaken primarily for *prosecutorial* purposes, then [appellee] violated 'clearly established' law." Brief for Appellants at 56 (emphasis in original). We dismissed this argument in *Chagnon v. Bell,* concluding that there exist no clear standards for defining or evaluating the "purpose" of a warrantless national security wiretap. Consequently, allegations of prosecutorial purpose raise no genuine issues relevant to the defense of qualified immunity. 642 F.2d at 1062 n.25.

Second, appellants argue that, even if Mitchell violated no clearly established rights under the Fourth Amendment, appellants' clearly established *Sixth* Amendment rights were violated when the taps remained in place after a number of appellants had been indicted on criminal charges. *See* page 3 & notes 8-9 *supra.* Unfortunately, appellants can advert to no evidence whatsoever that might indicate that Mitchell was aware that the surveillance had not been terminated upon indictment in accordance with the instructions he had previously issued. *Zweibon I,* 516 F.2d at 610-11 ("Mr. Mitchell was unaware that the taps continued for more than a month after criminal indictments were handed down against several individuals (five of whom are plaintiffs in this case) whose conversations, including those with their attorney, were overheard in violation of Justice Department regulations.") (footnotes omitted) ; *see* page 3 & note 10 *supra.*

[19] The dissent contends that the decision in Katz v. United States, 389 U.S. 347 (1967), "clearly established" that presidentially authorized wiretaps were illegal, and that the Court's explicit reservation regarding "situation[s] involving the national security," *id.* at 358 n.23, was merely a hint that the Court might choose to "create" an exception "in the future." *See infra* at 3. This reading of *Katz* must be rejected. Wire-

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taps, in national security situations, were authorized by presidents as early as 1915. The practice became well-established during the administration of President Franklin D. Roosevelt, and was continued by each succeeding administration. See the history of presidentially authorized wiretapping set forth in United States v. Barker, 514 F.2d 208, 243 nn.14 & 16, 246-48 (MacKinnon, J., dissenting). The Supreme Court recently stated that while a practice "in violation of the Constitution" does not become constitutional "by long use," nevertheless "an unbroken practice . . . is not something to be lightly cast aside." Marsh v. Chambers, No. 82-23, slip op. at 7 (U.S. July 5, 1983) (*quoting* Walz v. Tax Commission, 397 U.S. 664, 678 (1970)). A governmental practice established by specific written presidential orders effective continuously for over 40 years must be recognized as being clearly established. And *Katz* also specifically recognized that the constitutional restriction on searches conducted outside the judicial process was "subject . . . to a few . . . exceptions." 389 U.S. at 357. In view of this long-standing and continuous practice, the Court's explicit reservation in *Katz* makes it clear that the Court was referring to existing "exceptions," not, as the dissent asserts, simply speculating about whether it would "create" an exception at some future date.

The dissent also asserts that it is Mitchell's burden to prove that the law was *established* in his favor at the time he acted. This is not consistent with *Harlow.* It was only necessary for the Attorney General to show that the law was unsettled (as the conflicting district court cases and this court's struggles with the issue in *Zweibon I* amply demonstrate), *not,* as the dissent suggests, that a Supreme Court opinion had specifically approved the Attorney General's actions.

SWYGERT, *Senior Circuit Judge*, dissenting: I would reverse the district court's dismissal and direct entry of judgment for the plaintiffs. The issue is whether John N. Mitchell, under whose direction the FBI installed warrantless electronic wiretaps in the Jewish Defense League headquarters between October 1970 and July 3, 1971, is entitled to immunity from liability for his violation of plaintiffs' right to be free from unreasonable searches and seizures. There is no question that Mitchell violated those rights. *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (*en banc*) (*Zweibon I*), *cert. denied*, 425 U.S. 944 (1976). The only question is whether the constitutional prohibition of warrantless eavesdropping in these circumstances was "clearly established" at the time the wiretaps were ordered, under the standard established by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court there held

> that Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

Mitchell has not met his burden of establishing an immunity defense under the *Harlow* standard. At the time Mitchell ordered the warrantless wiretaps at issue, *United States v. Katz*, 389 U.S. 347 (1967), had established

> that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few exceptions.

Id. at 357 (footnotes omitted).

Because the Supreme Court had expressly reserved ruling on national security wiretaps in *Katz*, the majority concludes that no clearly established warrant or reasonableness requirements existed at the time Mitchell authorized the surveillance. Although *Katz* did not expressly decide whether the requirements of the fourth amendment could be satisfied in a situation involving the national security if "safeguards" short of a magistrate's authorization were provided, *id.* at 358 n.23; *see also id.* at 364 (White, J., concurring), the majority's reliance on these reservations ignores the Court's broad holding that long-established fourth amendment protections apply to electronic surveillance, as to other forms of intrusions, subject only to well-defined exceptions such as searches incident to arrest, searches made in hot pursuit, and searches subject to consent. *Katz* established no exception to this general rule of fourth amendment applicability for situations involving national security; indeed, the Court emphasized that "[i]t is difficult to imagine how any of those [established] exceptions could apply to the sort of search and seizure involved in this case." *Id.* at 357. The Court's footnote and Justice White's comment did not create a national security exception, but rather declined to state whether such an exception might be created in the future. It was the exception, rather than the rule, that was not clearly established in 1970-1971. The majority's analysis anomalously transforms the lack of an exception into the lack of a rule.

Subsequent cases demonstrate the presumptive breadth of the *Katz* rule. In *United States v. United States District Court*, 407 U.S. 297, 314-21 (1972) (*Keith*), the Supreme Court, relying on the general language of *Katz*, held that judicial approval was required prior to electronic surveillance in domestic national security cases. Similarly, in *Zweibon I*, *supra*, a plurality of this court noted that *Katz* stated a broad and general rule "that warrantless electronic surveillance conducted through non-trespassory methods is an unreasonable search and seizure within the meaning of the Fourth Amendment." 516 F.2d at 611. Finally, in *Zweibon v. Mitchell,* 606 F.2d 1172, 1179 (D.C. Cir. 1979) (*Zweibon III*), this court held "that *Keith* and *Zweibon I* . . . did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations."

The majority's reasoning that the lack of a specific ruling that warrantless electronic surveillance was constitutionally proscribed in national security situations left Mitchell no clearly established guidelines is skewed. In my view, the unquestioned constitutional right that was violated in this case is the right, *reaffirmed* by *Katz* in 1967, to be free from unreasonable searches and seizures. *Katz* did not *extend* fourth amendment protections, but rather concluded that no exception exempted electronic eavesdropping from the coverage of those protections. In the same sense, *Keith* did not *extend* fourth amendment protection to domestic organizations. *See Keith,* 407 U.S. at 320 ("We do not think a case has been made for the requested *departure* from Fourth Amendment standards."). Because the fourth amendment warrant requirement is presumed to apply unless a clear exception excuses compliance, and because no exception for national security cases was established when Mitchell acted, the law to which he was subject was "clearly established." Under the majority's reverse reasoning, "clearly established statutory or constitutional rights" would be fact-bound, circumscribed by the particular circumstances of prior litigated cases, rather than by the principles by which those cases were decided.

Mitchell chose to ignore the principle on which *Katz* turned, apparently gambling that later Supreme Court decisions might limit the universality of *Katz* by establishing exceptions in national security situations. Under the *Harlow* standard, however, government officials who depart from "settled, indisputable law" in the hope that an exception will later be created justifying their conduct do so at their peril.*

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* The majority finds it "odd that appellants would charge Mitchell with a duty to apply, *at his peril," see ante* at 19, n.17 (emphasis added), two district court decisions finding warrantless wiretaps unconstitutional when directed at domestic groups. "Application" of *United States v. Smith,* 321 F. Supp. 424 (C.D. Cal. 1971), or *United States v. Sinclair,* 321 F. Supp. 1074 (E.D. Mich. 1971), would have resulted in either the cessation of the warrantless wiretaps or the procurement of a warrant. It is unclear to me what "peril" Mitchell would have faced had he chosen either of these options.

Further, it is difficult to reconcile the majority's emphasis on the "reasonableness" of Mitchell's reliance on certain district court opinions with the "irrelevance" of Mitchell's disregard of internal Justice Department memoranda advising him that warrants were required. If the latter are irrelevant under *Harlow,* I would assume the former would be also.

Jury verdict on appellate review

See Doe v. DC, 697 F.2d 1115 for main opinion

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

See 701 F2d 94 (1983) for this one

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2171

JOHN DOE, ET AL.

v.

DISTRICT OF COLUMBIA, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 79-01726)

Argued November 23, 1981

Opinion for the Court issued January 11, 1983.

Separate statements issued January 28, 1983.

The following are separate statements filed by MACKINNON and EDWARDS, *Circuit Judges* and ROBB, *Senior Circuit Judge.*

Edward E. Schwab, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel and

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Michael Zielinski, Assistant Corporation Counsel were on the brief, for appellants. *David P. Sutton,* Assistant Corporation Counsel also entered an appearance for appellants.

Peter J. Nickles, with whom *Ellen Bass, Joseph M. Fisher* and *Charles E.M. Kolb* were on the brief, for appellees.

Separate Statement of MACKINNON, *Circuit Judge:* For the reasons set forth in the opinion for the court, the judgment of the district court is vacated and the case remanded for a new trial. I am moved to point out, however, that I acquiesce in the court's decision only because defendants have not appealed from the district court's decision to deny their motion for judgment n. o. v. I harbor grave doubts whether plaintiffs have adduced sufficient evidence to support a jury verdict. It is my hope that the district court will conduct the new trial with an eye to the concerns expressed below.

A *class* action brought by all the prisoners in the Maximum Security Complex (Maximum) at the District of Columbia Reformatory at Lorton, Virginia (Lorton) against the District of Columbia municipal and reformatory officials (officials) who administer the penal institution,[1] resulted in a judgment awarding money damages to the class and granting an injunction. Defendants were sued in their *official* capacities and the theory of plaintiffs' case required them to prove that the D.C. defendants were liable because of acts resulting from *official policy. Cf. Monell v. New York Department of Social Services,* 436 U.S. 658, 690-92 (1978). The jury award of damages and the court order of injunctive relief granted to the class of prisoners were (1) for the alleged *infliction* by the officials of "cruel and unusual punishment" (a *constitutional* tort)[2] by the District of Columbia officials responsible for the administration of Maximum and (2) for the alleged negligent failure of the defendant officials to provide adequate protection against inmate assault. Each of the six counts of the complaint is based on violence, i.e., the officials' "failure to provide adequate security and protection has caused plaintiffs to be exposed to pain and suffering by the constant risk and likelihood of *physical violence* . . . ." Amended Complaint ¶ 90, JA 33 (emphasis added). The class was certified as all prisoners inside Maximum and the "common questions of law and fact affecting the rights of inmates [was stated as the right] to be free from actual and threatened inmate *violence* and pervasive risk of harm." Amended Complaint ¶ 7, JA 15 (emphasis added). The D.C. and reformatory officials appeal the judgment on a variety of procedural bases and seek remand for a new trial.

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[1] Lorton Reformatory is administered by the city officials and employees of the District of Columbia, which operates under a home rule charter.

Basically my review of the complete trial record left me unconvinced that the finding of a constitutional tort and negligence by the officials was supported by substantial evidence of sufficient magnitude to support a *class* action. It was also a matter of concern to me that damages in a substantial amount, over $500,000 excluding interest, were to be paid to the class, i.e., *all prisoners in Maximum.* The plaintiff prisoners, who claim to be *representative* of the class, are confined for the following offenses: Two for first degree murder; one for murder, kidnapping and armed robbery; two for second degree murder; one for second degree murder and bank robbery; one for manslaughter; six for armed robbery; one for armed robbery and attempted rape; one for assault with a dangerous weapon; and one for grand larceny. Amended Complaint ¶¶ 12-28, JA 16-18.

Judge Edwards' opinion for the court, at pages 12-18, points out the error in the court's instruction that led to the monetary award. It is also significant that the class included all the prisoners who were creating the conditions of which they complained. Appellants have correctly noted on the record that

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[2] The Eighth Amendment prohibits the *infliction* of "cruel and unusual punishment."

> [p]laintiffs were . . . both assailants and victims, weapon possessors, violators of security rules, men always ready to take advantage of one another by violent means and totally unwilling to share knowledge of weapons or assaults with prison personnel . . . .[3]

The prisoners demanded damages and injunctive relief from D.C. officials and prison administrators for alleged violence that they refused to report (Tr. 265, 280, 294, 297, 322, 338, 349, 375). More significantly, this case would represent the *first case in America* that diligent research could find where an award of money damages to a *class of prisoners* had been upheld. *Individual* prisoners had previously been awarded money damages for individual torts, but so far as I can find, money damages have never been paid to an entire *class of prisoners* despite several cases of very egregious prison conditions. And the evidentiary record here indicates that conditions at Lorton do not even approach the conditions that were present in cases like *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), involving the Arkansas State Penitentiary System; *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), involving the State Penitentiary at Parchman, Mississippi; or the Alabama prisons which were the subject of the decisions in *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283

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[3] Memorandum of Points and Authorities in Support of Motion of Defendants for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and Rehearing or, in the Alternative, for Remittitur; R. 187 at 8. The statement in the text describes the plaintiffs who would be the beneficiaries of the monetary award provided for by the jury verdict and the judgment of the District Court.

(5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh,* 438 U.S. 781 (1978) (per curiam), where injunctions were issued to correct conditions in penitentiaries. It is incongruous to pay money damages to prisoners who are *causing* the violence and unhygienic conditions, who adhere to a code of silence, and who refuse to report violations or to cooperate (Tr. 287-89) in ameliorating the conditions about which they complain.

Typical of conditions in the prisons involved in the above cited cases, where complainants were limited to injunctive relief, were the conditions in the Arkansas State Penitentiary System. The Eighth Circuit decision found that prison to be fraught with cruel and unusual conditions, including, *inter alia,* the following: Ninety-nine percent of the security force at one of the prisons was comprised of so-called "trusty inmates" or "trusties"—privileged inmates who lorded over, abused, tortured, beat, and even occasionally murdered fellow inmates under their charge. *Holt v. Sarver, supra,* 309 F. Supp. at 373-76. With respect to the "trusty" system, the court noted that "just about every abuse which the system is capable of producing has been produced and is being practiced in this State." *Id.* at 374. Because of the lack of qualified inmate supervision—one facility housing 1,000 inmates had *eight* noninmate guards—violence among inmates went completely unchecked. This was particularly true in the "open barrack" dormitories, where upwards of 100 inmates per barrack were assigned "without regard to anything but rank and race." *Id.* at 376. Stabbings in the dead of night by "crawlers" and "creepers" [4] were commonplace and often condoned by the "trusties" themselves, who were often " 'in league with the assailants.' " *Id.* (quoting *Holt v. Sarver* (*Holt I*), 300 F. Supp. 825, 830 (E.D. Ark. 1969)). Gang rapes were frequent, often with "trusties" "look[ing] on with indifference or satisfaction." *Id.* at 377. Of this barrack-style confinement, the court said, in sum:

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[4] "Creepers" and "crawlers" are inmates who slither across dormitory floors to attack sleeping "enemies" in other parts of the dormitory.

> Sexual assaults, fights, and stabbings in the barracks put some inmates in such fear that it is not unusual for them to come to the front of the barracks and cling to the bars all night. That practice, which is of doubtful value is called "coming to the bars" or "grabbing the bars." Clearly, a man who has clung to the bars all night is in poor condition to work the next day.

Id. Isolation cells were "overcrowded, filthy, and unsanitary." *Id.* at 378. Inmates in isolation were given unsuitable food and were forced to live among rats. *Id.* For the inmates in general, there was no rehabilitation program of any kind. *Id.* at 378-79. Medical and dental care was subpar and largely unavailable. *Id.* at 380. Sanitary conditions in the kitchen were "deplorable." *Id.* In sum, these conditions exhibited "a dark and evil world," *id.* at 381, far beyond the constitutional pale. "However constitutionally tolerable the Arkansas system may have been in former years, it simply will not do today as the Twentieth Century goes into [its] eighth decade." *Id.* at 381.

Other cases finding prison conditions unconstitutional address a concatenation of factors similar to those condemned in *Holt*, *Gates*, and *Pugh*.[5] Usually, a substantial number of deplorable factors coalesce in prisons where a constitutional violation has been found. Where—as here—only a single factor is alleged—violence—it must be so pervasive as to constitute a systemic infliction, particularly in a class action. It is elementary that a judgment in a class action must be based on proof of harm to the class. In the present case, there is insufficient evidence viewed in the light most favorable to the verdict from which a *reasonable* juror could infer that the *official policies* of the defendants caused a systematic exposure of the class to an unreasonable risk of physical harm.

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[5] *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982) (overcrowding, understaffing, classification, sanitation, medical care, physical safety, isolation and segregation, rehabilitation); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) (shelter, sanitation, food, overcrowding, inmate safety, understaffing, health and psychiatric care), *cert. denied*, 450 U.S. 1041 (1981); William v. Edwards, 547 F.2d 1206 (5th Cir. 1977) (violence (270 stabbings, 20 deaths in three years), overcrowding, understaffing, fire and safety hazards, health care, sanitation); Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), *remanded*, 599 F.2d 17 (1st Cir. 1979) (sanita-

Judge Edwards' separate statement expends its first nine pages misconstruing the foregoing paragraph, thereby setting up a straw man who would impose a "strong presumption that prisoners must show that they have been brutalized by *not one* but a '*substantial number*' of inhumane conditions before they are entitled to relief under the Eighth Amendment," p. 7 (emphasis added). But my opinion states that "*a single factor*" may be sufficient, *supra* at 6-7; it does not require "a substantial number of inhumane conditions." So to assert is a gross misstatement.[6] A single systemic condition can support a class action.

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tion, lights, heating, ventilation, noise, idleness, fear and violence, absence or inadequacy of programs of classification, education, recreation, and vocational training). *See also* Villanueva v. George, 659 F.2d 851, 854 (8th Cir. 1981) (en banc) (pretrial detainee) ("[Our decision] is . . . based upon the totality of the circumstances . . . ."); Madyun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981) ("We are aware that the essence of an Eighth Amendment violation consists of the *totality of the conditions* of confinement." (emphasis added)); Williams v. Edwards, *supra,* 547 F.2d at 1211 ("*Totality of conditions violate Eighth Amendment.*" (emphasis in original)); Bono v. Saxbe, 527 F. Supp. 1187, 1195 (S.D. Ill. 1981); Heitman v. Gabriel, 524 F. Supp. 622, 625 (W.D. Mo. 1981).

[6] Other misstatements I will merely leave to the judgment of the reader.

Class actions, as discussed at pages 12 to 16 of my colleague's separate opinion, are designed to eliminate the necessity of bringing "a multiplicity of identical cases." But class actions were not intended or designed to reduce the standard of proof that one single case required or to substitute a large smoke screen of facts for concise proof of the basic elements required to prove the case alleged. That is practically what I see happening here in the failure of the plaintiffs to prove, *inter alia*, that any official conduct proximately caused even one of them the harm they allege. This is in addition to their failure to prove understaffing, excessive violence or overcrowding. *See* discussion, *infra.*

I. VIOLENCE

The Maximum prisoners complain of violence. However, this court and other courts have held that the existence of a number of assaults in a given prison is not *per se* "unreasonable" by common law negligence standards. *Murphy v. United States*, 653 F.2d 637 (D.C. Cir. 1981). As we noted in *Murphy*, "[v]iolence is unfortunately endemic to American prisons . . . . [A prisoner, and here the class, must prove] . . . that [the] numbers [of assaults in question] were *outside the range of violence normally associated with this type of penal institution*, or that any subset of prisoners suffered from an unusual risk of attack." *Id.* at 642 (emphasis added) (footnote omitted). Here plaintiffs were required to prove that the assaults clearly exceeded the range of violence normally associated with groups of *the most violence-prone felons.* Their evidence, viewed most favorably, does not constitute such proof. My colleague asserts that this court is not adequately prepared to undertake a thorough examination of the evidence to support the jury verdict. That statement is erroneous. The court is not only adequately prepared to thoroughly review the evidence, but that is its duty. And as a result of such review I find it insufficient to support the verdict.

Prisoners in Maximum are confined together because, of all prisoners in the institution, they have demonstrated by their prior conduct, in or out of prison, that they present the *maximum* risk of violence or escape. "Prison setting is, at best, tense. It is sometimes explosive, and always potentially dangerous." *Marchesani v. McCune*, 531 F.2d 459, 462 (10th Cir.), *cert. denied*, 429 U.S. 846 (1976). The existence of some violence in prisons is unavoidable, given the character of the prisoners society must place behind bars.

As Justice Powell noted in *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (emphasis added) (footnote omitted):

> This Court must proceed cautiously in making an Eighth Amendment judgment because, unless we reverse it, "[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment," and thus "[r]evisions cannot be made in the light of further experience." *Gregg v. Georgia*, 428 U.S., at 176. In assessing claims that conditions of confinement are cruel and unusual, *courts must bear in mind that their inquiries "spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." Bell v. Wolfish*, 441 U.S. at 539.[7]

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[7] *See also* Meachum v. Fano, 427 U.S. 215, 229 (1976) ("[F]ederal courts do not sit to supervise state prisons . . . ."); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) ("[T]he problems of prisons in America are complex and intractable, and . . . they are not readily susceptible of resolution by decree."); Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854, 859 (4th Cir. 1975) (en banc) ("Because of this want of judicial expertise, 'prison officials must be accorded latitude in the administration of prison affairs,' [citing cases] and their judgments are entitled to 'great weight' [citing cases].").

And jury expertise is even more wanting than judicial expertise. Justice Powell went on in *Rhodes* to quote *Procunier v. Martinez,* 416 U.S. 396, 404-05 (1974) (footnote omitted):

> "[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism."

Rhodes v. Chapman, supra, 452 U.S. at 351 n.16.

Though Maximum does have some violence, the statistics offered by the prisoners at trial show an average of only fifteen assaults per year by inmates on other inmates from 1973 to 1980. JA 154-58. Such a low level of assaults does not support a claim of the infliction of cruel and unusual punishment upon plaintiffs under their own expert testimony, or under our decision in *Murphy,* which should control here—by virtue of its precedential value and its reasonableness. Comparative statistics were not introduced into evidence and so we are left to glean such statistics as we can from decided cases. First, the assaults in Maximum are very substantially lower than in *Holt, Pugh,* and the rest. In this case, while an average of fourteen (13.866) assaults per year by inmates on other inmates was reported for the seven-and-a-half year period from 1973 to July 1980,[8] only one death may have occurred, and the evidence is inconclusive that it occurred within the period covered by the complaint. (Tr. 348). No riots causing mass injury took place. There was no "trusty" system, with its attendant ill-effects, in operation. In *Murphy v. United States, supra,* which involved the Lorton Youth Center—housing about 560 decidedly less violent inmates—this court ruled that *twenty inmate assaults in the calendar year 1976, six of which occurred in a dormitory housing a hundred youths, were "not so high as to strike this court as per se unreasonable."* 653 F.2d at 642 n.19 (emphasis added). In view of that precedent, with which my colleague fails to deal, I cannot conclude that an average of fourteen or fifteen assaults per year in the *maximum security* facility at issue in this case—which houses 400 inmates—is sufficient to support a finding that the number of assaults was unreasonable, excessive or indicative of insufficient protection. The nature of the population in Maximum alone would lead anyone to expect a greater risk of assault than would the population of the Youth Correction facility that was involved in *Murphy.* A comparison of the assault statistics for Lorton's Maximum with those in Lorton's Youth Correction complex is set forth in the margin.[9] Since the

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[8] That there were 14 assaults per year indicates that slightly less than 4 percent of the inmate population at Maximum were assaulted. By comparison, in Miller v. Carson, 563 F.2d 741, 745 (5th Cir. 1977), some 27 percent of the inmates were assaulted in the year in question. If the assault record

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at Lorton for the last half of 1980 were assumed to continue at the same rate as during the first half of the year, the average per year would be increased to 15 (14.875) per year for the eight year period.

An average assault figure over the period represents the most reliable approach to evaluating conditions, since appellees are seeking damages over the period; damages could not be awarded for a period of time when violence was not allegedly unreasonable, i.e., before 1980, as my colleague's separate opinion would do. See p. 20 n.30.

[9] Lorton's Maximum had a capacity of 400 and Lorton's Youth Correction Center, according to Department of Corrections data, had an average inmate population of 562 for

gravamen of the prisoners' complaint is excessive violence, their proof does not support their complaint and their claim that the incidence of assaults was unreasonable cannot withstand our decision in *Murphy*.

On the issue of what amount of violence may reasonably be expected, it is also significant that Eugene Miller, the *plaintiffs'* own penological expert witness, testified that *twelve to twenty inmate assaults per year at Maximum was the expected range of such assaults.* JA 243-44. Thus, by plaintiffs' own standard, an average of fourteen or fifteen assaults per year, falling within that expected range and below that we found to be reasonable in *Murphy*, cannot be held to constitute sufficient evidence of the official infliction by defendants of cruel and *unusual* punishment on the *class.*

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the calendar year 1976. Annual Report at 22, 26. The statistics introduced by *plaintiffs* include the following comparative "Assault Information" for Youth Correction and Maximum for the fiscal years that overlapped calendar year 1976. Plaintiffs' Exhibit 573, JA 154:

"Assault Information"

Resident on Resident and Resident on Staff

Fiscal year	Youth Correction*			Maximum*		
	Resident on Resident	Resident on Staff	TOTAL	Resident on Resident	Resident on Staff	TOTAL
1975	41	3	44	10	10	20
1976	26	6	32	14	4	18

* Average population for calendar year 1976, 565.

* Population, 400 maximum.

This indicates that the assault ratio in Maximum was even less favorable to plaintiffs' contentions.

Prisoners with the most extreme records of violent propensities and violent crimes cannot expect that life in a *maximum security* prison, where their classification requires them to be housed, will be devoid of all violence. Such expectation is plainly unreasonable, except in an even more highly structured environment.[10] All that the prisoners had a right reasonably to demand was that violence not be *excessive.* Their own evidence demonstrates that it is not.

In Part II.C. of his separate statement, my colleague refers to some of the evidence of violence at Maximum. While these incidents are horrendous, the character of the violence does not exceed what one might expect in a maximum security prison, and the total number of assaults, as discussed fully elsewhere, is not excessive. As Judge Merhige stated in *Penn v. Oliver*, 351 F. Supp. 1292, 1294 (E.D. Va. 1972):

> It would be fantasy to believe that even the most enlightened prison officials operating with unlimited resources could prevent all acts of violence within the prison. Moreover, even if a prison official fails through his negligence to prevent an act of violence, a violation of constitutional right is not of necessity stated.

That case involved an individual complaint under 42 U.S.C. § 1983, and the principle is even more applicable to a class action case. My colleague's opinion naively ignores the wisdom expressed by Judge Merhige. It should also be pointed out that the prisoners' testimony on violence lacked specificity as to the parties involved and the dates. But the greatest defect in their testimony lies in the failure to establish a nexus between the unspecific assaults and the *official policies* of District officials—a failure to prove that official policy was the proximate cause of the harm complained of. While the testimony as to the assaults had the ring of truth for a prison such as Maximum, much of the testimony as to causation had a self-serving defect. On the general issue of the amount of violence and the staffing required, my colleague's separate opinion misstates my view by asserting it to be my opinion that "average conditions" will invariably pass constitutional muster. But that is *not* my stated opinion, which is, rather, that *conditions much better than average*—better, in fact, than those this court found reasonable in *Murphy* and which plaintiffs' expert witness did not find to be unreasonable—were insufficient to support a finding of a constitutional violation.

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[10] The calculated risk implicit in present conditions is discussed *infra.*

II. STAFFING

The prisoners also contend that staffing was inadequate and was thereby a cause of violence. In my view the prisoners have not discharged their burden to prove by a preponderance of the evidence that staffing was inadequate. Understaffing has been discussed extensively in several cases. The national average of inmates to guards in United States prisons is 5 to 1. *Ruiz v. Estelle*, 503 F. Supp. 1265, 1290 (S.D. Texas 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982). Any figure appreciably above that ratio has been held contributory to cruel and unusual prison conditions. In *Ruiz v. Estelle*, *supra*, 679 F.2d at 1140, for example, the Fifth Circuit determined that Texas state prisons had an unacceptably high inmate-to-guard ratio of 12.45 to 1. In *Pugh v. Locke*, *supra*, 406 F. Supp. at 322, 325, the ratio was 9.3 to 1—still grossly inadequate.

At Lorton there were 122 guards at Maximum in charge of some 400 prisoners. JA 151. The inmate-to-guard ratio was thus 3.27 to 1. This is *much* better than the national average of 5 to 1, not to mention the ratios in *Ruiz* and *Pugh*. As a matter of law, therefore, such a ratio was not "woefully inadequate" or so "impermissibly high" as to constitute sufficient evidence that constitutional standards were violated. My colleague seeks to term this an argument for an "industry standard," with its well-known defect, but the Maximum figure is 34 percent better than what he would term the industry standard. And my colleague does not suggest any ratio he would find acceptable. His argument is totally lacking in specificity. Plaintiffs' evidence on understaffing, on which it bears the burden of proof, is obviously insufficient. Moreover, neither the prisoners nor my colleague have proven what the minimum standard is, and merely calling Maximum "understaffed" does not make it so.

Under D.C. Code § 24-442, the District of Columbia owes prisoners the identical duty of "reasonable care in the protection and safekeeping" owed them under principles of common law negligence. *Gaither v. District of Columbia*, 333 A.2d 57, 60 (D.C. App. 1975). Prison personnel are not, however, insurers of an inmate's safety. *Matthews v. District of Columbia*, 387 A.2d 731 (D.C. App. 1978). Thus, the fact that an inmate is assaulted and sustains injuries does not, by itself, establish liability. *District of Columbia v. Davis*, 386 A.2d 1195, 1200 (D.C. App. 1978). "The [inmates] must establish by competent evidence a standard of care; that the defendant[s] violated that standard; and that such violation proximately caused injury to the [inmates]." *Hughes v. District of Columbia*, 425 A.2d 1299, 1302 (D.C. App. 1981). The prisoners' evidence is insufficient to satisfy this standard.

The duty imposed on defendants requires "the exercise of ordinary dilegence to keep prisoners safe and free from harm." *Jones v. United States*, 534 F.2d 53, 54 (5th Cir.), *cert. denied*, 429 U.S. 978 (1976). Some antisocial behavior is to be expected in a prison environment;

accordingly, the government is *not* an insurer of the safety of a prisoner, *id.*; *Fleishour v. United States*, 244 F. Supp. 762, 767-68 (N.D. Ill. 1965), *aff'd*, 365 F.2d 126 (7th Cir.), *cert. denied*, 385 U.S. 987 (1966), or here, of the class of all prisoners in Maximum. "The government's liability ultimately depends upon *whether the risks it took were reasonable or unreasonable.*" *Cowart v. United States*, 617 F.2d 112, 116 (5th Cir.) (emphasis added), *cert. denied*, 449 U.S. 903 (1980).[11] To impose liability on the District and its officials also requires proof that their actions were the proximate and foreseeable cause of the alleged injuries. *Id.* As stated above, this necessary element of the case has not been proved.

Courts will not readily find negligence (or the official *infliction* of cruel and unusual punishment) from the presence of some risk, as is indicated by the so-called "calculated risks" test first articulated in *Fleishour.* There, the court recognized that it is the

> standard practice in modern penal institutions to take calculated risks in various aspects of prison life, housing, work, recreation, religious worship and others, so that prisoners may learn to get along with other persons as part of the rehabilitation process. The result is, that from time to time, there occurs an episode such as that here involved in which the gamble is lost and another prisoner is injured.

244 F. Supp. at 767. *See also Williams v. United States, supra,* 384 F. Supp. at 584. Thus, in *Fleishour*, housing a number of inmates in one big room, a room in which there was a fire extinguisher on the wall, constituted a rehabilitative program that involved a calculated risk that excusably backfired. No finding of negligence was warranted—even in a case involving a single individual.

It is obvious from the record that the prison conditions here, to some extent, respresent a calculated risk taken by preferring to allow more freedom rather than closer confinement. Were the officials negligent, or *inflicting* cruel and unusual punishment, in allowing the inmates at Maximum the freedom of movement that they enjoyed? If the result of allowing prisoners such freedom (with no overcrowding, a more than adequate staffing ratio of 3.27 to 1, and a not unacceptable prisoner assault average of fourteen or fifteen a year) were to be that District taxpayers must pay over a half a million dollars to the prisoners—many of whom cause the problems that exist—the eventual solution would probably be to increase greatly restrictions on prisoners' freedom of movement by creating a more controlled environment. Locking prisoners in their cells for greater periods of time might be one solution. Also, their ability to associate with other prisoners might be substantially curtailed. Such practices might also impede rehabilitation. Would plaintiffs welcome a remedy that required them to be confined to their cells for more substantial periods of time, to have their freedom to associate with other prisoners more severely restricted, or to have their movements otherwise hobbled? If they prevail in their lawsuit, such may be the result.

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[11] *See generally,* Prosser, Law of Torts 146 (4th ed. 1971).

Considering all the evidence, it is my view that the choices Lorton made were reasonable and were made in the prisoners' interests. The result has been uncrowded living conditions, commendable freedom and a not unacceptable incident of assaults. Prison officials do *not* have the luxury of selecting their clientele. There will always be a danger of assaults when the most dangerous and violent criminals are confined in a single section of a prison facility, as they must be. But unless prisons lock up such prisoners in individual cells and greatly restrict their freedom of movement within the facility, as was once the practice, such institutions must be permitted to take calculated risks. In my view, the evidence here is insufficient to support a finding that the risks in Maximum exceeded what was reasonable or that the conditions at Lorton " 'involve[d] the unnecessary and wanton infliction of pain.' "

Rhodes v. Chapman, supra, 452 U.S. at 346 (quoting *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) (Stewart, Powell, Stevens, JJ.)).

I also have some difficulty agreeing to a new trial. A new trial will *not change* the facts that average assaults were only fourteen or fifteen a year, that the staffing ratio was 3.27 to 1, or that 400 inmates in Maximum do not establish overcrowding. Under the theory of the plaintiffs' complaint, these *unchangeable facts* substantially undercut the principal basis for their claims that the *class* was harmed as a result of pervasive negligence or that cruel and unusual punishment was *officially inflicted* on the *class.* It thus appears to me that *unchangeable evidence* as to vital elements of plaintiffs' complaint *disproves* their claims. I also have considerable difficulty in supporting a conclusion that money damages can be awarded to a *class* of prisoners in mass that includes many prisoners who are causing the conditions complained of and will not cooperate to help correct them.[12]

I close with a summary statement regarding my colleague's separate opinion. He attacks what statistics are available, but substitues nothing in their place. He exaggerates the violence, understates the staffing, misstates my opinion, and deems it proper to reward a *class* of inmates for causing violence whose alleged level is based substantially upon speculation on unreported assaults. The number of definite assaults that were actually recounted at trial does not add up to a constitutional violation; to hold that it does would trivialize constitutional violations. My colleague's reliance upon unreported assaults, and the assaults he assumes were committed after the period covered by the lawsuit, constitutes a tacit admission that the evidence of assaults in the record is insufficient to support the verdict.

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[12] A fact-finding committee scrutinizing Maximum in 1979 found problems with sanitation and hygiene that were attributable to the prisoners themselves. The committee recommended that "[a]ll inmates [should] be required to clean their cells on a daily basis subject to disciplinary action for noncompliance." JA 183. I cannot agree that such neglect of their own cells and the condition it creates constitute official negligence or a constitutional tort for which the District of Columbia should be required to compensate the inmates. The Constitution does not require a prison to service inmates' cells.

However, as stated above, for reasons set forth in Judge Edwards' opinion for the court, I concur in vacating the judgment and remanding the case for a new trial.

As he indicates in this separate statement, Judge Robb shares the doubts expressed above that plaintiffs made a case in the District Court, but acquiesces in Judge Edwards' opinion for the Court.

Separate Statement of EDWARDS, *Circuit Judge*: Though he concurs in the foregoing Opinion for the Court, Judge MacKinnon has written separately,[1] expressing his individual view that there may not have been adequate evidence presented at trial to support the verdicts rendered. Though, before the District Court, appellants routinely moved for judgment notwithstanding the verdict, they have not argued on appeal the question of the sufficiency of the evidence. In these circumstances, it seems to me not only unnecessary but unwise for this court to discuss the adequacy of the evidentiary foundation for the decisions reached below. My reluctance to engage in such an inquiry is overcome, however, by my sense of the importance of not allowing some of the statements in the Concurring Opinion to pass uncontested. I, therefore, offer my own separate statement in order to prevent the creation of any misimpressions regarding the content of the legal doctrines governing permissible conditions of incarceration and to dispel any doubts concerning the sufficiency of the evidence adduced below.

I. PRISON CONDITIONS AS "CRUEL AND UNUSUAL PUNISHMENT"

In my view, the most serious misstatements of law in the Concurring Opinion concern standards of liability under the Eighth Amendment. Four aspects of its presentation of the constitutional doctrine are especially problematic: its explication of the "totality of the circumstances" test; its discussion of permissible levels of prison violence; its analysis of the effect on constitutional norms of invocation of the class action procedure; and its assessment of the significance of "average" prison conditions in determining what constitutes "cruel and unusual punishment." These issues are discussed in order below.

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[1] For the sake of convenience, I will refer to my colleague's separate statement as the "Concurring Opinion."

A. *The "Totality of the Circumstances" Test*

One of the principal arguments used by the Concurring Opinion to call into question the sufficiency of the evidence is that appellees' allegations of constitutional infringement were limited, for the most part, to one aspect or dimension of their incarceration. The Concurring Opinion insists that the inmates alleged only that they were exposed to excessive risk of assault and sexual abuse (caused or aggravated by various conditions), and that appellees failed to show or even assert that other conditions at Maximum—such as health care, food service and rehabilitative and recreational programs—fell below constitutional standards. The Concurring Opinion thus suggests that, because appellees' complaint was so narrowly focused, they were not entitled to relief unless they could show that conditions in the identified dimension were unusually brutal.

In advancing this argument, the Concurring Opinion intends to rely on a legal theory that has been adopted in many judicial opinions construing the Eighth Amendment—a theory frequently referred to as the "totality of the circumstances" test.[2] The suggestion in the Concurring Opinion that one must consider the "totality of the circumstances" at a given prison, by itself, surely is not objectionable. Rather, what is troublesome here is the apparent construction of the "totality of the circumstances" test offered in the Concurring Opinion—a construction that I find at odds with judicial precedent.

Hitherto, the "totality of the circumstances" test always has been used as shorthand for one or both of two insights. First, separate prison conditions that exacerbate one another must, of course, be considered together to determine whether their cumulative impact is sufficient to violate the ban on "cruel and unusual punishment."

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[2] *See, e.g., Clay v. Miller,* 626 F.2d 345, 347 (4th Cir. 1980) (per curiam).

Thus, when a particular procedure or form of treatment, such as punitive or solitary confinement, is challenged, one must examine all of the constituent aspects of that form of incarceration to determine whether, *in combination*, they run afoul of the Constitution. *Hutto v. Finney*, 437 U.S. 678, 685-88 (1978); *Maxwell v. Mason*, 668 F.2d 361, 363 & n.8 (8th Cir. 1981). The same principle applies when one is assessing the constitutional status of a prison as a whole. Insofar as "[t]he 'touchstone' of the Eighth Amendment inquiry is 'the effect upon the imprisoned,' " *Rhodes v. Chapman*, 452 U.S. 337, 366 (1981) (Brennan, J., concurring) (quoting *Laaman v. Helgemoe*, 437 F. Supp. 269, 323 (D.N.H. 1977)),[3] it is not sufficient to consider, *seriatim*, the influence on the prisoners of each of various arbitrarily designated dimensions of prison life (health care, food, inmate safety, etc.). Conditions in each of these areas "exist in combination; each affects the other; and taken together they [may] have a cumulative impact on the inmates . . . ." *Holt v. Sarver*, 309 F. Supp. 362, 373 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). "Even if no single condition of confinement would be unconstitutional in itself, 'exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment.' " *Rhodes v. Chapman*, 452 U.S. at 363 (Brennan, J., concurring) (quoting *Laaman v. Helgemoe*, 437 F. Supp. at 322-23).[4]

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[3] *Cf. Carey v. Piphus*, 435 U.S. 247, 254 (1978) (reaffirming the principle that the purpose of constitutional tort actions is "to compensate persons for injuries caused by the deprivation of constitutional rights") (discussed in the Opinion for the Court, Part IV.).

[4] *See also Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977); *Williams v. Edwards*, 547 F.2d 1206, 1211, 1219 (5th Cir. 1977). *But see Hoptowit v. Ray*, 682 F.2d 1237, 1246-47 (9th Cir. 1982); *Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981) (both holding that the conditions in the various dimensions of prison life must be evaluated inde-

The second insight embodied in the "totality of the circumstances" test consists of a recognition of the unusual structure and purpose of most suits challenging terms of incarceration on the basis of the Eighth Amendment. Such controversies belong to a special category of litigation that has been denominated "complex enforcement."[5] Among the atypical features of suits of this sort, two are relevant in the present context. First, the wrong attacked is not a single, discrete transgression on the part of the defendant, but a system of related behavior, a "practice" engaged in over time by an entire institution.[6] Second, the willingness (on the part of both plaintiff and court) to mount such a systemic attack reflects a "transformative vision," a conviction that the real source of illegality is the organization of the institution in question, not the delicts of its individual officials, and that the law can and should dig deep in and, if necessary, substantially reorder that institution to ensure that its conduct is consistent with the society's fundamental norms.[7] As applied to Eighth Amendment suits, both of these features imply that the attention of the parties and the adjudicator ought to be directed at the structure

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pendently). Without approving of the holdings of *Hoptowit* and *Wright*, it is worth noting that they are incompatible with my colleague's conclusion that the coalescence of "a substantial number of deplorable factors" is necessary to give rise to cruel and unusual punishment.

[5] *See* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626, 626 (1981); L. Sargentich, Complex Enforcement (March 1978) (unpublished manuscript) (on file at the Harvard Law School Library). Other studies of this special kind of litigation include Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

[6] Sargentich, *supra* note 5, at 9-22.

[7] *Id.* at 77-85.

and conduct of the prison as a whole, not at separate facets or conditions.[8]

To the extent that my colleague means to refer to these two insights, his invocation of the "totality of the circumstances" test is unexceptionable. But the manner in which the Concurring Opinion distinguishes the instant action from some prior cases involving broader spectra of constitutional violations suggests that more may be intended. It would appear from the Concurring Opinion that attention to the "totality of the circumstances" implies that a prison must be rife with brutality before constitutional barriers are breached. It is thus argued that one or a few "deplorable factors" rarely will be enough; inmates usually must demonstrate "a substantial number" of outrageous conditions before they can get relief.[9] Neither of the two insights discussed above lends any support to this suggestion. That two or more conditions may exacerbate one another does not mean that a single condition, if serious enough, cannot violate the Eighth Amendment. And that an adjudicator often must enlarge his field of vision to include all aspects of an institution's structure and behavior does not imply that he must be blind to one vicious or degrading practice.

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[8] Only relatively recently has the Eighth Amendment begun to be used in this systemic way. Before the 1960s, it was principally used to evaluate individual, judicially-imposed sentences. *See* Note, *Creatures, Persons, and Prisoners: Evaluating Prison Conditions Under the Eighth Amendment,* 55 S. CAL. L. REV. 1099, 1101-02 (1982). The modern usage of the provision, however, is now firmly established and has received the imprimatur of the Supreme Court. *See Rhodes v. Chapman,* 452 U.S. at 345-47.

[9] In fairness, I would note that, at a few points, the Concurring Opinion appears to concede that "a single factor" might give rise to a constitutional violation—at least if "so pervasive as to constitute a systemic infliction." To the extent that these concessions represent acknowledgments that the "totality of conditions" test does nothing more (and nothing less) than embody the two insights just described, I cease to quarrel with this aspect of my colleague's opinion. To the extent that the retreat is incomplete, my objection stands.

In my view, the test proposed in the Concurring Opinion is also inconsistent with an enormous body of case law. The opinions are legion that indicate that unacceptable conditions in even one of the dimensions identified by the Concurring Opinion will run afoul of the Constitution.[10] Moreover, the courts in most of the cases that have involved "a substantial number of deplorable factors" have stated the rules thereby violated as *independent* constitutional requirements—making it clear that they were identifying and condemning a series of separate Eighth Amendment violations, any one of which alone would constitute "cruel and unusual punishment." [11]

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[10] *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 103-04 (1976) (dicta) (medical care); *Maxwell v. Mason,* 668 F.2d at 363-65 (conditions in solitary confinement); *Withers v. Levine,* 615 F.2d 158, 161 (4th Cir.) (threat of sexual assault from fellow inmates), *cert. denied,* 449 U.S. 849 (1980); *Leonardo v. Moran,* 611 F.2d 397, 398-99 (1st Cir. 1979) (dicta) (threat of violence from other inmates); *Burks v. Teasdale,* 603 F.2d 59, 62-63 (8th Cir. 1979) (overcrowding); *Todaro v. Ward,* 565 F.2d 48, 52-53 (2d Cir. 1977) (medical care); *Little v. Walker,* 552 F.2d 193, 197 (7th Cir. 1977) (exposure to violence and sexual abuse by other inmates), *cert. denied,* 435 U.S. 932 (1978); *Woodhous v. Commonwealth of Virginia,* 487 F.2d 889, 890 (4th Cir. 1973) (per curiam) (threat of violence and sexual assault from other inmates); *Stewart v. Rhodes,* 473 F. Supp. 1185, 1193 (S.D. Ohio, E.D. 1979) (prolonged, punitive use of "four-way" physical restraints violates the Eighth Amendment [a holding unrelated to the court's additional finding that racial segregation of prisoners violates the Fourteenth Amendment]), *appeal dismissed,* 661 F.2d 934 (6th Cir. 1981); *Kish v. County of Milwaukee,* 48 F.R.D. 102, 103-04 (E.D. Wis. 1969) (exposure to violence and sexual abuse by other inmates), *subsequent disposition aff'd,* 441 F.2d 901 (7th Cir. 1971).

[11] *See, e.g., Hoptowit v. Ray,* 682 F.2d at 1246-47, 1250, 1252-53, 1257-58, 1259; *Wright v. Rushen,* 642 F.2d at 1133

Finally, the standard advocated by the Concurring Opinion is inconsistent with the Supreme Court's recent analysis of Eighth Amendment doctrine. In *Rhodes v. Chapman*, the Court reaffirmed the holdings of *Estelle v. Gamble* and *Hutto v. Finney*, that either the denial of medical care by itself or the kind of multifaceted inhumanity that characterized the Arkansas prisons would constitute "cruel and unusual punishment." 452 U.S. at 347. The Court then went on to say:

> Conditions other than those in *Gamble* and *Hutto*, *alone or in combination*, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in *Gamble*.

Id. (emphasis added).[12]

(dicta); *Campbell v. Cauthron*, 623 F.2d 503, 505-09 (8th Cir. 1980); *Williams v. Edwards*, 547 F.2d at 1219 (after affirming the judgment of the trial court that "the totality of conditions" at the prison was unconstitutional, the court of appeals went on to hold that, by itself, "the level of medical care" at the prison "violated the eighth and fourteenth amendments"); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976) (holding that "[t]he combination of conditions alleged by the prisoners . . . have the cumulative effect of being cruel and unusual punishment . . . . Many of the circumstances taken alone reach the level of cruel and unusual punishment, such as the Chinese cell, inadequate exercise and medical treatment, inadequate heating and ventilation, and lack of access to the prison library."); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 200-09 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291, 1301-10 (5th Cir. 1974) (applying the cumulation theory to various factors affecting inmate safety but holding that plaintiffs had proved independent constitutional violations in the areas of hygiene, health care, solitary confinement, corporal punishment, and reliance upon "trusty" guards); *Martinez Rodriguez v. Jimenez*, 409 F. Supp. 582, 594 (D.P.R. 1976), *aff'd*, 551 F.2d 877 (1st Cir. 1977). *But see Holt v. Sarver*, 309 F. Supp. at 373.

[12] Justice Brennan, joined by Justice Blackmun in concurrence, laid more stress than did the majority on the need to

The test elaborated in the Concurring Opinion appears especially implausible when applied to the facts of this case. Assuming, *arguendo*, that a poor diet or inadequate clothing, without more, cannot rise to the level of a constitutional violation, it is difficult to see how the same can be said of the prevalence of violence. Many members of the appellee class have been beaten, stabbed or raped.[13] The remainder live in constant fear of such assaults. Undoubtedly several will be physically or psychologically maimed when—and if—they leave the prison. The suggestion that, unless coupled with other forms of inhumanity, prolonged subjection to such harms and risks cannot constitute "cruel and unusual punishment" is impossible to fathom.

In short, the Concurring Opinion appears to seize upon the concept of the "totality of the circumstances," ignore its well-established meaning and legitimate foundations, and transform it into a strong presumption that prisoners must show that they have been brutalized by not one but "a substantial number" of inhumane conditions before they are entitled to relief under the Eighth Amendment. The only suggestions in the Concurring Opinion as to why such a drastic doctrinal reform might be warranted are the references to judicial language counseling caution and restraint when assessing prison conditions. Those admonitions, however, provide no support for the proposal advanced in the Concurring Opinion. While it is certainly

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consider the totality of prison conditions. 452 U.S. at 362-63. But he too recognized that a single circumstance of incarceration, inconsistent with contemporary standards of decency, would violate the Constitution. Thus he observed, "[*e*]*ven if*," in a given case, "no single condition of confinement would be unconstitutional in itself," the combined effect of prison conditions may violate the Eighth Amendment—clearly leaving open the possibility that a single degrading circumstance might, by itself, amount to cruel and unusual punishment. *Id.* at 363 (emphasis added).

[13] *See* Part II.C. *infra.*

true that federal courts must accord legislators and prison officials some latitude in designing and testing solutions "to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system," *Rhodes v. Chapman*, 452 U.S. at 352, it is equally true that the courts have a duty to protect the constitutional rights of prisoners.[14] Every modern opinion in the field has affirmed as much. Thus, immediately following the language in *Rhodes* that the Concurring Opinion finds so telling, the Supreme Court makes it plain that:

> Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as "deplorable" and "sordid." When conditions of confinement amount to cruel and unusual punishment, "federal courts will discharge their duty to protect constitutional rights."

452 U.S. at 352 (footnote and citations omitted).[15]

B. *Exposure to Violence as a Form of Punishment*

Possibly because of the weak underpinnings of its variant of the "totality of the circumstances" standard, the Concurring Opinion does not place all of its weight on that stanchion. The opinion goes on to sketch the state of the law regarding permissible levels of inmate violence under the Eighth Amendment. The thrust of the analysis appears to be that, even if we consider only the violence issue, the appellees have failed to show that they were exposed to a sufficiently serious risk of harm to satisfy the stringent requirements for making out a constitutional violation.

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[14] Indeed, the special place of prisoners in our society makes them more dependent on judicial protection than perhaps any other group. Few minorities are so "discrete and insular," so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority. Federal courts have a special responsibility to ensure that the members of such defenseless groups are not deprived of their constitutional rights. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); J. ELY, DEMOCRACY AND DISTRUST 135-36, 145-70 (1980).

[15] *See also Bell v. Wolfish*, 441 U.S. 520, 562 (1979); *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam).

The Concurring Opinion does not purport to state any clear legal standard concerning how prevalent prison violence must be before the Constitution is offended. However, various comments in the opinion—regarding the "unavoidability" of frequent assaults, the congenital viciousness of maximum-security inmates, and the legitimacy of prison officials taking "calculated risks"—give the general impression that nothing short of open warfare among the prisoners, countenanced by the guards and administrators, will state a claim under the Eighth Amendment.

To expose the fallacy inherent in this conception of the state of the law, one needs only to quote a few of the leading opinions in the field. The central norm in this area is that,

> [a] prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief.

Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (per curiam) (citation omitted). *Accord Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); *Doe v. Lally*, 467 F. Supp. 1339, 1348, 1354 (D. Md. 1979). Prison officials have a corresponding *duty* "to exercise reasonable care to prevent prisoners from intentionally inflicting harm or creating unreasonable risks of harm to other prisoners." *Withers v. Levine*, 615 F.2d at 161. *Accord Woodhous v. Virginia*, 487 F.2d at 890; *Doe v. Lally*, 467 F. Supp. at 1354. Or, as the Ninth Circuit has recently put it, "[p]rison officials have a duty to take reasonable steps to protect inmates from physical abuse." *Hoptowit v. Ray*, 682 F.2d 1237, 1250 (9th Cir. 1982) (citation omitted).

The opinion of the Fourth Circuit in *Withers v. Levine* persuasively elaborates these general principles. The Court of Appeals was concerned that a phrase used in its prior decision in *Woodhous* to describe conditions at the prison in question[16] had been improperly construed as a statement of the threshold of liability. The court corrected the misinterpretation in the following terms:

> A pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidents, but it may be established by much less than proof of a reign of violence and terror in the particular institution. The defendants seized upon that explanatory phrase from *Woodhous* to contend that something approaching anarchy must be proven before a cause of action under *Woodhous* may be made out, but conditions need not deteriorate to that extent before the constitutional right to protection arises. It is enough that violence and sexual assaults occur on the idle tier at MHC with sufficient frequency that the younger prisoners, particularly those slightly built, are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures.

615 F.2d at 161.

In sum, the Concurring Opinion holds appellees to an unduly high standard of liability concerning impermissible levels of violence. To be entitled to relief under the Eighth Amendment, appellees need only have shown that violence and sexual assaults occurred at Maximum sufficiently often to induce prisoners reasonably to fear for their safety and to make the prison officials aware of the problem, and that those officials failed to take reasonable steps to protect the inmates.

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[16] *See Woodhous v. Virginia*, 487 F.2d at 890 ("[C]onfinement in a prison where violence and terror reign is actionable.").

C. *Constitutional Norms and Class Actions*

The Concurring Opinion attempts to buttress its novel formulations of the applicable standards of liability by attributing unusual significance to the fact that the case at bar was brought as a class action. The opinion is riddled with references to appellees' status as a "class" but at no point does it clearly indicate why this seemingly irrelevant circumstance is so important. Various hints in the opinion suggest an adherence to one or both of two theories. The first is plausible but is not germane; the second is indefensible.

At a few points, the Concurring Opinion appears to refer to the fact that class action suits in which plaintiffs seek monetary damages for the deprivation of their civil rights are sometimes conducted in two stages. In the first stage, the issue of the defendant's *liability* (*i.e.*, the question whether the defendant has breached some statutory or constitutional duty it owes to all members of the plaintiff class) is adjudicated. In the second stage, which ensues only if such liability is established, the *remedy* to be awarded each individual plaintiff is determined. This second phase of the suit often entails the submission and evaluation of additional evidence—relating, for example, to the question whether the defendant's misconduct was a "but-for" cause of the injury sustained by each claimant.[17] If this is the scenario envisioned by my colleague,

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[17] *See, e.g., Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 437, 444-45 (5th Cir.), *cert. denied,* 419 U.S. 1033 (1974).

I have no quarrel with it;[18] however, I fail to see its relevance to the question whether appellants breached their obligation not to subject appellees to cruel and unusual punishment. The fact that, under some conceivable procedure for processing the case, a finding of liability might be followed by the adducement of additional evidence pertaining to the relief to be granted *individual* prisoners is of no significance in the present context.

Other language in the Concurring Opinion seems to suggest not that class actions may be procedurally bifurcated in the fashion indicated, but that suits brought on behalf of a class should be subjected to more stringent substantive standards of liability than individual actions. This suggestion is unsupported and insupportable. The Concurring Opinion points to no case law or commentary adopting or advocating such an extraordinary theory. And no arguments, based on logic or policy, favor such a conception of the differences between the two forms of litigation.

Certainly the notion that individual and class actions are governed by different standards of liability makes no sense when applied to the facts of the case at bar. The heart of the appellees' claim is that they have been and continue to be exposed to a risk of rape, assault or murder—a risk serious enough to give rise to a constitutional violation. All prisoners at Maximum have been and still are exposed to the same danger; any one of them could have brought an individual action challenging the conditions of his confinement. The fact that the inmates have combined their efforts and, with the permission of the District Court, have presented their claims in the form of a class action has no conceivable bearing on the merits of their allegations.

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[18] Indeed, the propriety of such a procedure was recently confirmed by this court. *See Milton v. Weinberger,* No. 81-2200, slip op. at 8-9 (D.C. Cir. Oct. 26, 1982) (dicta).

Nor does the theory proposed in the Concurring Opinion find any support in the voluminous case law dealing with Eighth Amendment challenges to prison conditions. The courts' hitherto unquestioned belief that the standards of liability are the same in the two procedural contexts is manifested by the fact that they treat citations to opinions that involve class actions and citations to opinions that involve individual suits as interchangeable.[19] Indeed, for any significant point of law in this field, one can find comparable authority in class action cases and in cases brought by individuals.[20]

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[19] The single opinion that arguably might constitute an exception to this rule turns out, upon examination, to be ambiguous at best. In *Maxwell v. Mason*, 668 F.2d 361, 364-65 (8th Cir. 1981), the Eighth Circuit distinguished the decision of the Fifth Circuit in *Novak v. Beto*, 453 F.2d 661 (1971), *reh'g denied*, 456 F.2d 1303, *cert. denied*, 409 U.S. 968 (1972), partly on the ground that "*Novak* was a class action in which the entire system of solitary confinement of the Texas Department of Corrections was challenged as unconstitutional." 668 F.2d at 365. But the court immediately thereafter made clear that its principal reason for discounting the relevance of *Novak* was that the latter involved a situation in which prisoners kept in solitary confinement were provided with clothing and blankets whereas the prisoner in the case before it had been given only undershorts and a mattress. 668 F.2d at 365. At no point did the Eighth Circuit suggest that *Novak* was inapposite solely because it involved a class action rather than an individual suit.

[20] Thus, for example, of the ten cases cited in note 10, *supra*, in support of the principle that unacceptable conditions in even one of the dimensions delineated by the majority violate the Constitution, four involved class actions and six involved individual suits. Similarly, of the eight cases cited in note 11, *supra*, in support of the proposition that courts addressing multifarious violations most often state the constitutional norms thereby infringed as independent requirements, six involved class actions and two (at least at the stage of development at which they were being considered) involved individual suits.

The argument suggested in the Concurring Opinion appears even more fragile when one takes into account the principles upon which class actions are founded. Scholars continue to disagree over the best way to explain and justify the binding effect of judgments in such cases on ignorant or involuntary class members and the tendency of the class action device to facilitate the initiation of certain kinds of suits;[21] however, all agree that the essence of the class action procedure is that "[i]t provides a means by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class."[22] In other words, a class action does not involve claims different in substance from those involved in an individual action. It is merely a mechanism for allowing a group of people, all of whom have suffered or are suffering the same wrong, to join together to seek redress.

This conclusion is reinforced by consideration of the status and function of FED. R. CIV. P. 23, the provision on which class actions brought in the federal courts are based. Both the origins of Rule 23 and its interpretation in other contexts indicate that successful invocation of the provision does not trigger a shift in the applicable substantive standards of liability. The Enabling Act, pursuant to which the rule was promulgated, expressly provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right . . . ." 28 U.S.C. § 2072 (1976). Moreover, it is settled that Rule 23 is sufficiently confined to questions of "procedure" to be applicable in diversity actions without transgressing the constitutional requirement that federal courts defer to state "substantive" law in such situations. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1758 (1972); *Briskin v. Glickman*, 267 F. Supp. 600, 603-05 (S.D.N.Y. 1967).[23] In short, "Rule 23 is considered a procedural rule, rather than one that affects the substance or the merits of litigation." H. NEWBERG, CLASS ACTIONS § 2135 (1977) (footnote omitted).

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[21] *See* Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1337-43, 1348-72 (1976) (discussing the theories that currently seem most plausible).

[22] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 345 (1976).

Finally, consideration of the practical effect of the doctrine intimated in the Concurring Opinion makes its senselessness even more apparent. Were the proposed theory to be widely adopted, the prisoners in every future case, aware that they would be confronted with elevated standards of liability if they brought a class action, would likely instead bring a series of individual suits. The court would consequently be compelled to hear and evaluate a multiplicity of essential identical cases, rather than a single consolidated action. The resultant waste of time and energy is precisely what Rule 23 was designed to avoid.

In sum, the apparent suggestion in the Concurring Opinion that the appellees, because they brought their suit in the form of a class action, must satisfy specially stringent standards of liability, is unprecedented and untenable.

D. *National Prison Standards and "Cruel and Unusual Punishment"*

A significant portion of the hypothetical evaluation in the Concurring Opinion of appellees' evidence takes the form of comparative analysis. Thus, in assessing appellees' claim that the situation at the prison was aggravated by understaffing, the Concurring Opinion observes that the inmate-to-guard ratio at Maximum was better than the national average. In considering the prevalence of violence, the opinion stresses that assaults occurred less frequently at Maximum than at other prisons where Eighth Amendment violations have been found. Moreover, the opinion notes, the incidence of violence was within the range of figures that an expert witness had testified was to be "expected" in a prison like Maximum. The Concurring Opinion insists that these observations should be fatal to appellees' Eighth Amendment cause of action. Unless inmates can show that the conditions of their confinement are worse than average, it argues, they cannot make out a claim that they have been subjected to "cruel and *unusual* punishment."

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[23] *Briskin* involved pendent, not diversity jurisdiction, but the court held that the same principles apply in the two contexts. 267 F. Supp. at 603.

When the Concurring Opinion applies this kind of comparative analysis to appellees' negligence claims, it falls into patent error. It has long been hornbook law that conformity to industry standards is insufficient to establish due care. As Judge Learned Hand once put it:

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

The T. J. Hooper, 60 F.2d 737, 740 (2d Cir.) (citations omitted) (dicta), *cert. denied*, 287 U.S. 662 (1932).[24]

The mode of analysis employed in the Concurring Opinion is equally inappropriate when applied to the Eighth Amendment. Whatever may have been the original meaning of the constitutional provision,[25] it is now well established that the ban on "cruel and unusual punishment" is defined with reference, not to prevailing penal practices, but to "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). In determining whether a given condition violates the amendment, courts and juries are to look, not to circumstances common in other prisons, but to "the public attitude toward a given sanction." *Rhodes v. Chapman*, 452 U.S. at 349 n.13 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion)). The touchstone is "what the general public would consider decent." *Hoptowit v. Ray*, 682 F.2d at 1246 (citation omitted).

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[24] *See also Texas & P. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903); *Morrison v. Kansas City Coca-Cola Bottling Co.*, 175 Kan. 212, 263 P.2d 217, 224 (1953).

[25] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

Although the public at large may at times close its eyes to the sad truth, it is undeniable that conditions in the nation's prisons often are extraordinarily brutal and degrading.[26] It would thus not be surprising if many aspects of current "industry standards" fell below "what the general public would consider decent." In any case, it is clearly erroneous to assume that "average" conditions will invariably pass constitutional muster.

II. THE SUFFICIENCY OF THE EVIDENCE

As I indicated at the outset, this court should not—indeed is not adequately prepared to—undertake a thorough examination of the sufficiency of the evidence to support the jury's verdict. The following section does not purport to conduct such a comprehensive review of the record. Its purpose is merely to highlight the most serious errors in the survey of the testimony attempted in the Concurring Opinion.

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[26] *See generally Rhodes v. Chapman*, 452 U.S. at 354-56 (Brennan, J., concurring); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS (1973); Gettinger, *Accreditation On Trial*, CORRECTIONS MAG., Feb. 1982, at 7; Andersen, *What Are Prisons For?*, TIME, Sept. 13, 1982, at 38.

A. *The Standard of Review*

The rule governing appellate review of the sufficiency of the evidence to support a jury verdict is both strict and well established. That standard requires that "the evidence, along with all inferences reasonably to be drawn therefrom, . . . [be] viewed in the light most favorable to" the party in whose favor the verdict was rendered. *Alden v. Providence Hospital*, 382 F.2d 163, 165 (D.C. Cir. 1967). Moreover, unless an appellate court can determine that "no reasonable man could reach a verdict in favor of" the prevailing party, the jury's verdict must be allowed to stand.[27]

p. 96

Application of the foregoing standard of review to the facts of the instant case, even adopting the Concurring Opinion's inflated liability theories, yields only one conceivable conclusions: we would be required to uphold the verdict if the strength of its evidentiary foundation were an issue before us. The most that could be said in appellants' favor is that "reasonable men" might disagree over the sufficiency of the evidence; it surely could not be concluded, however, that "*no* reasonable man could reach a verdict in favor of" appellees. Only by misconstruing statistical evidence and ignoring a plethora of incriminating testimonial evidence adduced below, is the Concurring Opinion able to suggest that the matter is even worthy of discussion.

B. *The Treatment of Statistical Evidence*

Numerical evidence presented at trial, particularly that relating to levels of violence, is misused in the Concurring

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[27] *See, e.g.*, *Muldrow v. Daly*, 329 F.2d 886, 888 (D.C. Cir. 1964). Several hundred cases adopting the same test are cited in 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 50.02[1] nn.20-21 (2d ed. 1982). The Concurring Opinion at a few points appears to suggest that the verdict should be overturned on appeal if it is not supported by "substantial evidence." To the extent that those suggestions are intended to dilute the stringent "reasonable man" standard, they find no support in the voluminous case law.

Opinion in three ways. First, the opinion contrasts, somewhat carelessly, the statistics relating to the incidence of assaults at Maximum with figures gathered at other institutions with only selective regard for the comparability of the respective reporting systems and prison populations. When a reference to comparability is advantageous, it is incorporated in the discussion. But when such favorable references are not available, the Concurring Opinion does not hesitate to evaluate violence statistics without any background information whatsoever.[28] This skewed treatment of the data only compounds the problems created by reliance upon such comparative analysis in the first place.[29]

Second, the Concurring Opinion makes much of the fact that the average incidence of reported assaults at Maximum is "only fifteen" per year. But the figure most relevant to the appellees' claims is not the *average* level of violence over the preceding seven and a half years, but the incidence of violence at the time of the suit.[30] When that statistic is extracted from the record, the situation is revealed to be much more serious than the Concurring Opinion would have us believe. In the preceding six months there had been fifteen reported assaults at

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[28] See, *e.g.*, the references to the incidence of "brutality" and "assault" in the Duval County Jail, Jacksonville, Florida. The Concurring Opinion fails to consider whether the reporting systems are comparable and whether the statistics in question include minor altercations. (The opinion from which the data is drawn, *Miller v. Carson*, 401 F. Supp. 835, 883 (M.D. Fla. 1975), strongly suggests, at a minimum, that the figures relate to more than serious assaults, as the Concurring Opinion implies.)

[29] Those difficulties are discussed in Part I.D. *supra*.

[30] Certainly, for the purposes of determining the existence of a constitutional violation, the relevant variable is the incidence of violence at the time of the suit. The measure or scope of the remedy to which the inmates—individually or collectively—are entitled may well turn partially on other factors, such as fluctuations in the incidence of violence in the course of their periods of incarceration. But the latter question is not before us.

Maximum—an average of thirty per year—and the level of violence had been steadily rising since 1978. App. 157-58, 176.

An even more serious problem concerns the value of the statistics in question, no matter how they are construed, in assessing conditions at the prison. As testimony at the trial makes evident, very few of the assaults and homosexual rapes committed at Maximum ever find their way into the record books. Fear of reprisal, desire not to be known as a "snitch" and, in the case of homosexual attacks, reluctance to identify oneself as an "easy mark" deter victims from reporting such incidents.[31] Under the circumstances, the fact that the prison has records of an inmate assault rate of "only" thirty per year proves little. Indeed, given the dynamics of the situation, it would seem likely that, as the level of violence and the danger of reprisal increase, the percentage of incidents reported would decrease, thus compounding the problem.

C. *The Profusion of Testimonial Evidence*

The crucial factor, for the purpose of assessing the appellees' Eighth Amendment claim, is the seriousness of the risk of assault and sexual abuse to which they were exposed. Given the absence of reliable statistical indices of that risk, the trier of fact would have had to rely upon descriptions of the level of danger by inmates and prison officials. The record is replete with such testimony. Witness after witness described stabbings, beatings and fights. App. 264-65, 277, 294-97, 312, 315, 349, 359, 362. Several testified that they had observed homosexual rapes. App. 283, 286-87, 291-93, 338, 373. The more detailed accounts included descriptions of: a stabbing in the shower area, App. 274-75, 284-85, an attempted stabbing with a butcher knife, App. 251-52, beatings in the shower area, App. 280, cell burnings, App. 322-323, 363, an inmate "bleeding profusely from his stomach," App. 252, 271, an inmate thought to be a "snitch," picking himself up off the floor, bleeding from the mouth and nose, App. 266-69, a stabbed inmate bleeding from the chest, App. 339, and the death of an inmate resulting from seven or eight stab wounds near his heart, App. 348. To suggest that no reasonable man, presented with this evidence, could conclude that prisoners at Maximum were exposed to a pervasive risk of harm reflects both contempt for the judgment of the trier of fact[32] and callousness toward the appellees' plight.

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[31] The affidavit of Deborah Jones, a correctional officer, dramatically illustrates this state of affairs:

> I must emphasize that most inmate assaults go unreported because of the inmates' realistic fear of retaliation by other inmates. Burning of cells is an increasingly common form of retaliation. Understaffing prevents the correctional staff from effectively dealing with this grave security problem. Indeed, just four weeks ago, a cell burning occurred in cellblock 2; the fire was so intense and the destruction so complete that the inmate's typewriter melted.

App. 178. *See also* App. 265-69, 321-23. The reluctance of prisoners to report incidents—even when under oath at trial—is evident from the testimony of Mr. Davenport. App. 286-93, 295-99. Similar conditions are documented in *Doe v. Lally*, 467 F. Supp. at 1348-49; *Withers v. Levine*, 449 F. Supp. 473, 475, 478 (D. Md. 1978), *aff'd*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980).

III. CONCLUSION

In light of the foregoing discussion, appellants' decision not to raise on appeal the question of the sufficiency of the evidence is readily understandable. When the evidence adduced below, viewed dispassionately and through the lens of the applicable standard of appellate review, is measured against well-established substantive standards of liability under the Eighth Amendment, it becomes clear that the jury's verdict is not vulnerable to reasoned criticism.

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[32] The Concurring Opinion's disdain for the ability of the trier of fact to evaluate the evidence is further manifested by its reference to the paucity of "jury expertise."

Separate Statement of ROBB, *Senior Circuit Judge*: Although I share Judge MacKinnon's doubts that the plaintiffs made a case in the District Court, I acquiesce in Judge Edwards' opinion for the Court.

Harlow applied

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION, INC., *et al.*,
APPELLANTS

v.

RICHARD W. VELDE, *et al.*

On Remand from the United States Supreme Court
(D.C. Civil Action No. 75-1444)

Decided June 30, 1983

E. Richard Larson, *Isabelle Katz Pinzler*, *Burt Neuborne*, *William L. Robinson*, and *Norman J. Chachkin* were on the supplemental memorandum for appellants.

Robert E. Kopp and *Barbara L. Herwig*, Attorneys, Department of Justice, were on the supplemental memorandum for appellees.

Bennett Boskey was on the supplemental memorandum for appellee, Levi.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: TAMM, *Circuit Judge*, BAZELON, *Senior Circuit Judge*, and PARKER,* *United States District Court Judge.*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* TAMM.

BAZELON, *Senior Circuit Judge*: The Supreme Court vacated and remanded this case [1] for further consideration in light of its recent decision in *Harlow & Butterfield v. Fitzgerald.*[2] The remand requires that we address the following question: [3] Did appellees have "clearly established" statutory or constitutional duties to terminate federal funds to local law enforcement agencies allegedly known to be discriminating unlawfully on the basis of race and sex? The liability standard announced in *Harlow* entitles appellees to qualified immunity on summary judgment unless such clear duties existed.

Appellants allege that "termination" duties existed under Title VI of the Civil Rights Act of 1964, the Crime Control Act of 1973, and the due process clause of the fifth amendment. We find that such a duty was not clear under Title VI, but that clear duties to terminate funding existed under both the Crime Control Act and the fifth amendment. Accordingly, appellees are entitled to summary judgment with respect to appellants' claims for damages under Title VI, but not for the damage claims under either the Crime Control Act or the fifth amendment.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] 102 S. Ct. 3503 (1982).

[2] 102 S. Ct. 2727 (1982).

[3] Our earlier opinion, National Black Police Ass'n v. Velde, 631 F.2d 784 (D.C. Cir. 1980), addressed three issues: mootness, standing, and official immunity. Because the mootness and standing issues are unaffected by *Harlow,* we reinstate our earlier opinion with respect to those issues. We note that the termination of the Law Enforcement Assistance Administration since our last opinion may raise new questions concerning mootness with respect to appellants' claims for injunctive and declaratory relief. Because the parties have not addressed this issue in their supplemental briefs, however, we leave it to the district court to decide any mootness issues that may have arisen since our earlier opinion.

BACKGROUND

Prior Proceedings

Appellants, six blacks and six women, filed this lawsuit on September 4, 1975. They alleged that federal agencies and officials had violated appellants' constitutional and statutory rights by continuing to provide financial assistance to local law enforcement agencies that discriminate on the basis of race and sex. They claimed that this continued funding violated, *inter alia*, Title VI of the Civil Rights Act of 1964 (Title VI),[4] sections 518(c) and 509 of the Crime Control Act of 1973 (the Crime Control Act),[5] and the due process clause of the fifth amendment (fifth amendment). Appellants sought declaratory and injunctive relief against the Law Enforcement Assistance Administration (LEAA),[6] the Department of Justice, and four officials in those agencies. They also sought compensatory and punitive damages against the individual officials for alleged willful and knowing violations of their constitutional and statutory rights.[7]

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[4] 42 U.S.C. §§ 2000d-2000d-4 (1976).

[5] Pub. L. No. 93-83, §§ 509, 518(c), 87 Stat. 197, 211-12, 214 (amended 1976). The Crime Control Act of 1973 amended provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, title I, 82 Stat. 197 (amended version at 42 U.S.C. §§ 3701-3797 (Supp. V 1981).

[6] The LEAA, an agency within the Department of Justice, was created by Congress in 1968 to assist community and citizen groups in their law enforcement and criminal justice activities. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, title I, 82 Stat. 197.

[7] Amended Complaint at p. 35, Appendix 38. All references to the Appendix (App.) refer to the appendix filed in National Black Police Ass'n v. Velde, 631 F.2d 784 (D.C. Cir. 1980).

On December 8, 1976, the district court granted appellees' motion for dismissal.[8] The court held that plaintiffs' claims for declaratory and injunctive relief had "been rendered moot by virtue of the enactment of the Crime Control Act of 1976,"[9] which altered the statutory duties in question.[10] The court also held that appellants' damage claims against the individual officials were "barred by the doctrine of official immunity."[11]

The Supreme Court's subsequent decision in *Butz v. Economou*[12] limited the scope of official immunity available to government officials. The Court held that as a general rule, federal officials are entitled only to a qualified immunity in suits alleging constitutional violations. To escape liability, a defendant official must establish a good faith basis and reasonable grounds for his conduct.[13] The Court identified a limited exception to this general rule for administrative officials performing judicial and prosecutorial functions, reasoning that absolute immunity was necessary to protect discretionary prosecutorial decisions from the potentially distorting effect of threats of civil liability.[14]

On appeal of the district court's dismissal of the instant case, appellees argued that their discretion in administering the LEAA funds brought them within the narrowed realm of absolute immunity identified in *Butz.* Based on the mandatory language of the statute and appellees' constitutional duty not to use federal funds in a discriminatory manner, the court found the funding termination provisions to be mandatory, "outside the realm of discretion"[15] and that absolute immunity was therefore inappropriate.[16] Accordingly, the case was remanded for appellants to prove their claims and for appellees to demonstrate the factual basis for a qualified immunity.

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[8] 3 App. 479-80.

[9] *Id.* at 479.

[10] *See* Pub. L. No. 94-503, § 122(b), 90 Stat. 2407, 2418-21 (1976).

[11] 3 App. 480.

[12] 438 U.S. 478 (1978).

[13] *Id.* at 507. *Accord* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

[14] 438 U.S. at 512-17.

Appellees petitioned for review to the Supreme Court and the Court granted certiorari. While the case was pending, the Court decided *Harlow & Butterfield v. Fitzgerald*,[17] which significantly altered the law of official immunity. Shortly thereafter, the Court vacated our judgment in the instant case and remanded "for further consideration in light of *Harlow & Butterfield v. Fitzgerald*."[18] We requested the parties to file supplemental briefs on the matter.

Harlow & Butterfield v. Fitzgerald

Harlow substantially altered the standards governing motions for summary judgment in cases involving claims of qualified immunity. However defined, qualified immunity strikes an uneasy balance between two competing concerns: (1) the need to protect individual rights from official abuse, and (2) the need to shield well-meaning officials "from potentially disabling threats of liability."[19] The Court in *Harlow* reiterated that the latter concern requires quick resolution of insubstantial claims against government officials,[20] and noted that the existing qualified immunity standard had not adequately accomplished this objective.

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[15] 631 F.2d at 787 n.15.

[16] The Court also reversed the district court's decision that the case was moot and rejected appellees' argument that appellants lacked standing. *Id.* at 787.

[17] 102 S. Ct. 2727 (1982).

[18] 102 S. Ct. 3503 (1982).

[19] 102 S. Ct. at 2732.

Prior to *Harlow*, summary judgment on questions of qualified immunity generally required both subjective and objective determinations. Summary judgment was denied if there was a factual dispute about whether an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ." [21] By alleging that an official acted with malicious intent or with a belief that a clear standard prohibited such conduct, plaintiffs could create a factual dispute that frequently required a subjective determination necessitating a trial. The need for such determinations thus frustrated the goal of terminating insubstantial lawsuits on summary judgment.[22]

Harlow adjusted the summary judgment standard to make it rely on objective factors. Under the new standard, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." [23] On summary judgment, a court must first determine whether the rights allegedly violated were clearly established in the law.[24] That determination is purely legal. If the court finds that the rights were clearly established, and that there is a genuine dispute over material facts, summary judgment must be denied. In subsequent proceedings, a defendant can still obtain qualified immunity by showing that because of "extraordinary circumstances" he neither knew nor should have known that his conduct was unlawful.[25]

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[20] *Id.* at 2737. *See* Butz v. Economou, 438 U.S. 478, 507-08 (1978).

[21] Wood v. Strickland, 420 U.S. 308, 322 (1975).

[22] The court noted, 102 S. Ct. at 2737-38, that several courts have considered an official's subjective good faith as inherently requiring resolution by a jury. *E.g.*, Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir.), *cert. denied,* 439 U.S. 912 (1978); Duchesne v. Sugarman, 566 F.2d 817, 832-33 (2d Cir. 1977).

[23] 102 S. Ct. at 2738 (emphasis added).

Applying this standard to the instant case,[26] we must determine whether appellees' failure to terminate funding to local law enforcement agencies violated statutory or constitutional duties clearly established at the time the failure occurred. We find that appellants' allegations, judged in their most favorable light, allege violations of statutory and constitutional rights which were clearly established at the time they allegedly occurred. Summary judgment is therefore denied.[27]

ANALYSIS

Application of the Harlow *Standard*

Appellants contend that appellees' failure to terminate funding to discriminatory agencies violated clear duties imposed on them by three independent sources of law.[28] We consider each of these sources in turn.

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[24] *Id.* at 2739.

[25] *Id.*

[26] This case is technically before us on the district court's grant of a motion to dismiss. We adhere to our earlier position that absolute immunity is inappropriate and that the dismissal is to be reversed. However, because in the district court appellants had moved in the alternative for summary judgment, and because they argue that they are entitled to summary judgment as a matter of law, we will reach the question of whether summary judgment is appropriate.

[27] The district court has not yet ruled whether appellants' complaint states a claim upon which relief can be granted. We did not address this issue in our first opinion, and the issue has not been briefed for us. We therefore do not view the issue as properly presented for our decision in the present posture of this case.

Title VI

Section 601 of Title VI prohibits recipients of federal financial assistance from engaging in racial discrimination:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[29]

The Act also prescribes measures to be taken by federal funding agencies against recipients who disregard this prohibition.[30] Of particular relevance is 42 U.S.C. § 2000d-1:

> Compliance with any requirement adopted pursuant to this section may be effected (1) *by the termination of or refusal to grant or to continue assistance* under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, . . . or (2) *by any other means authorized by law.*

(emphasis added). Appellants contend that this provision imposed on appellees a clear duty to terminate funds to agencies that unlawfully discriminate.

On its face, however, the statutory language is not mandatory. Section 2000d-1 allows the funding agency to effect compliance through funding termination or "any other means authorized by law." Although fund termination was envisioned as the primary means of enforcement under Title VI,[31] and although it has proven very effective as a deterrent to discrimination,[32] Title VI clearly tolerates other enforcement schemes. Prominent among these other means of enforcement is referral of cases to the Attorney General, who may bring an action against the recipient.[33] The choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination.[34] Faced with this statutory discretion, we cannot say that appellees' failure to terminate funding violated a clearly established statuory duty under Title VI.

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[28] Appellants have not argued that Congress has in any way altered the common law standards for immunity with respect to the causes of action alleged in this case.

[29] 42 U.S.C. § 2000d (1976).

[30] 42 U.S.C. § 2000d-1 to 2000d-4 (1976).

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[31] *See Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 1544 (1963) (testimony of Sec'y Celebrezze, HEW); *id.* at 1786-88 (testimony of George Meany, AFL-CIO); *id.* at 1890-91 (testimony of Joseph Rauh, ADA); *id.* at 2161 (testimony of Roy Wilkins, NAACP) [hereinafter referred to as *Subcommittee Hearings*]. The wording of Title VI indicates a preference for the fund cutoff remedy. Not only is fund termination mentioned first, but it is the only sanction specifically named. 42 U.S.C. § 2000d-1 (1976). The preference for fund termination under Title VI is noted in, *e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 853 (5th Cir. 1966) ("Congress was dissatisfied with the slow progress inherent in the judicial adversary process . . . . [and] therefore fashioned a new method of enforcement."); REPORT OF THE WHITE HOUSE CONFERENCE, TO FULFILL THESE RIGHTS 63 (1966) ("administrative proceedings prescribed by Congress as the primary device of enforcing Title VI"); VI UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 22-24, 386-88 [hereinafter cited without cross-reference as VI COMMISSION REPORT—1974]; Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 827 (1968); *Notre Dame Conference on Federal Civil Rights Legislation and Administration: A Report*, 41 NOTRE DAME LAW 906, 922-24 (1966).

[32] Early use of the sanction by HEW is instructive. Between July, 1964 and March, 1970, HEW initiated approximately 600 administrative proceedings against school districts found not to be in compliance with section 601 standards. In 400 of these cases, HEW found that the districts came into compliance following threat of termination, with no need for actual termination. Among the 200 cases in which funds were actually cut off, HEW subsequently determined that compliance had been achieved, and federal assistance was resumed in all but 4 districts. VI COMMISSION REPORT-1974, at 384-85. *See* Adams v. Richardson, 480 F.2d 1159, 1163 n.4 (D.C. Cir. 1973) (en banc); Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 619 (1972); Comment, *supra* note 31, at 871.

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[33] H.R. REP. NO. 914, 88th Cong., 1st Sess. 86 (1963). *See* Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. § 50.3 (1982). The Guidelines also suggest a number of administrative alternatives to funding termination. *Id.*

[34] *Subcommittee Hearings, supra* note 31, at 1381-82 (testimony of Att'y Gen. Kennedy), 1544 (testimony of Sec'y Celebrezze, HEW), 1890 (statement of Rep. Celler); 110 CONG. REC. 2467 (1964) (statement of Rep. Gill).

The grant of a choice of remedies was also an attempt to accommodate competing views. Some civil rights advocates felt that funding termination should be mandatory. They saw in the relatively unbridled discretion of the agencies the potential for its abuse by a program-oriented bureaucracy or an inactive administration. *See, e.g., Subcommittee Hearings, supra,* at 2093-94 (testimony of Sidney Zagri, Teamsters Union), 2352 (statement of Rep. Halpern). As Roy Wilkins, Executive Secretary of the NAACP, explained:

> [W]e always shy away from "discretionary" in these areas. We feel that unless [funding termination] is made mandatory, all sorts of discretion will be exercised and until it is demonstrated in good faith that discretion means discretion and does not mean discrimination, then we would want mandatory phraseology in there.

Id. at 2161. Others opposed the funding termination remedy either on the grounds that it would jeopardize minority-oriented programs or that it would be an unwise or unconstitutional assumption of power by the executive. *See* 110 CONG. REC. 2466 (1964) (statement of Rep. Elliott); *id.* at 6527 (statement of Sen. Holland); *Subcommittee Hearings, supra* note 31, at 1583 (statement of Rep. Dorn); H.R. REP. NO. 914, 88th Cong., 1st Sess. 64, 86 (1963).

Adams v. Richardson,[35] on which appellants rely heavily, does not establish clear law to the contrary. In that case, officials of the Department of Health, Education, and Welfare (HEW) insisted that enforcement of Title VI was entirely committed to agency discretion and that an agency's decision to rely on voluntary compliance was therefore unreviewable in the courts. The court rejected that contention, but did not suggest that termination was the *only* available means for securing compliance. The court noted that "[t]he Act sets forth two alternative causes of action by which enforcement may be effected,"[36] and that a failed request for voluntary compliance "does not relieve the agency of the responsibility to enforce Title VI by one of the two alternative means contemplated by the statute."[37] Thus, while *Adams* makes it clear that federal funding agencies must do *something* to effect compliance, it did not clearly establish that funding termination was required.[38]

In holding that appellees' failure to terminate funding did not violate clearly established duties under Title VI, we do not imply that appellees have complied with that statute. Appellants' allegations concerning appellees' efforts to enforce their civil rights mandate paint a less than exemplary picture.[39] Compliance with Title VI might well have required appellees to pursue compliance more vigorously than they did, and injunctive relief may have been appropriate. But Title VI has been criticized as ineffective in securing civil rights, and such ineffectiveness has been attributed to the discretion in the statute precisely where appellants claim that there is none.[40] Because of that discretion, it was not clear that Title VI duties would be violated by a failure to terminate funds. Appellees are therefore entitled to qualified immunity for any suit based on Title VI arising out of their failure to terminate funds.

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[35] 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

[36] *Id.* at 1163.

[37] *Id.*

[38] Appellants cite several other cases from different circuits in support of their position. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), is perhaps closest on point. In that case, however, the precise question was whether the federal funding agency's "knowing acquiescence in [an] admitted discriminatory housing program violated either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964." Although the court made clear that violations of both sources of law had occurred, it did not make clear whether the agency's Title VI obligations could have been satisfied by a vigorous enforcement scheme that stopped short of fund termination.

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[39] If true, the picture is not unlike the disappointing civil rights efforts of several other federal agencies. The antipathy with which the federal bureaucracy has viewed Title VI has been documented by the Civil Rights Commission:

> The enforcement failure was the result, to a large extent, of placing the responsibility for ensuring racial and ethnic justice upon a massive Federal bureaucracy which for years had been an integral part of a discriminatory system. Not only did the bureaucrats resist civil rights goals; they often viewed any meaningful effort to pursue them to be against their particular program's self-interest.

UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT 7 (1973) [hereinafter cited as COMMISSION REPORT—1973]. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1091-92 (1970) [hereinafter cited as COMMISSION REPORT—1970]; Tomlinson & Mashaw, *supra* note 32, at 619.

The Department of Justice Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964, 28 C.F.R. § 50.3 (1982), issued in 1965, suggested alternative judicial and administrative means of enforcement and authorized fund termination only where those alternatives would be ineffective or inappropriate. The Civil Rights Commission found that every agency it examined in 1974 had failed to cut off funds in cases where termination would have been the appropriate means of enforcement. VI COMMISSION REPORT—1974, at 653, 762-97. *See* Adams v. Weinberger, 391 F. Supp. 269, 271 (D.D.C. 1975).

[40] *See,* Note, *Enforcing a Congressional Mandate: LEAA and Civil Rights,* 85 YALE L. J. 720, 723-28 (1976).

The Crime Control Act

The broad discretion over enforcement methods provided by Title VI is in sharp contrast to the mandatory language of the Crime Control Act. Section 518(c)(2) of the Act stated:

> Whenever the Administration [LEAA] determines that a State government or any unit of general local government has failed to comply with [the nondiscrimination requirements], it *shall* notify the chief executive of the State of the noncompliance and *shall* request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration *shall* exercise [its funding termination powers],[41] and is authorized concurrently with such exercise—

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[41] More precisely, the statute requires the Administration to exercise "the powers and functions provided in section 509 of this title," which states that

> Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this chapter, finds that, with respect to any payments made or to be made under this chapter, there is a substantial failure to comply with—
>
> (a) the provisions of this chapter;
>
> (b) regulations promulgated by the Administration under this chapter; or
>
> (c) a plan or application submitted in accordance with the provisions of this chapter;
>
> the Administration *shall* notify such applicant or grantee that further payments *shall* not be made (or in its discretion that further payments *shall* not be made for activities in which there is such failure), until there is no longer such failure.

42 U.S.C. § 3757 (Supp. V 1975) (current version at 42 U.S.C. § 3783 (Supp. V 1981)) (emphasis added).

(A) to institute an appropriate civil action;

(B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or

(C) to take such other action as may be provided by law.[42]

Congress enacted this statutory command in 1973, when it reviewed LEAA's initial grant of funds. In reviewing LEAA's civil rights enforcement efforts, Congress was struck by the agency's failure to follow the spirit of Title VI.[43] The number of the agency's staff assigned to civil rights was criticized as entirely inadequate.[44] Although LEAA had received numerous complaints of discrimination by recipients, it had *never* applied any sanctions and had *never* held a compliance hearing.[45] Indeed, LEAA had *never* even promulgated procedures for such a hearing.[46] Justice Department regulations governing LEAA expressed a preference for enforcement through judicial proceedings rather than fund termination,[47] yet LEAA had apparently never referred a case to the Attorney General, and only rarely had intervened in private suits.[48]

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[42] 42 U.S.C. § 3766(c)(2) (Supp. V 1975) (amended 1976) (emphasis added).

[43] *See Hearings on the Law Enforcement Assistance Administration Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 345 (1973) (statement of Sarah Carey) [hereinafter cited as *LEAA Hearings*]; 3 LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LAW AND DISORDER 32-36 (1973); 119 CONG. REC. 20,070-71 (1973) (statement of Rep. Jordan).

[44] Until 1971, LEAA had no civil rights office responsible for implementing its Title VI regulations; once established, the office was understaffed. *See* COMMISSION REPORT—1973, *supra* note 39, at 97; COMMISSION REPORT—1970, *supra* note 39, at 601, 634.

[45] *See* COMMISSION REPORT—1973, *supra* note 39, at 100-01.

[46] *See id.* at 100 n.27.

Against this background, Congress created a set of more stringent enforcement requirements addressed specifically to LEAA's civil rights obligation.[49] Congress explicitly rejected President Nixon's version of the bill, which merely stated that Title VI applies to LEAA.[50] Instead, Congress adopted sections 509 and 518(c)(2), which outlined a mandatory enforcement scheme that relies on funding termination. By doing so, Congress explicitly prevented LEAA from relying on the Title VI option of "any other means authorized by law."

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[47] 28 C.F.R. § 42.206(a) (1975) provided: "[W]here the responsible department official determines that judicial proceedings . . . are as likely or more likely to result in compliance than administrative proceedings . . . , he shall invoke the judicial remedy rather than the administrative remedy." In 1973, the Civil Rights Commission concluded that "LEAA has administratively repealed the remedy of fund cutoff." COMMISSION REPORT—1973, *supra* note 39, at 101 n.36.

[48] 119 CONG. REC. 20,071 (1973) (statement of Rep. Jordan). In two of the suits, Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974), and Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), LEAA intervened ten months and eight months after the suits were brought and only "as a result of a great amount of external pressure . . . to take some action." UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER 147 (1971). In the third case, intervention was by court order. 3 LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *supra* note 43, at 36.

[49] Crime Control Act of 1973, Pub. L. No. 93-83, § 2, 87 Stat. 197, 211-2, 214 (amended 1976).

[50] *LEAA Hearings, supra* note 43, at 26 (text of Administration bill, S.1234, 93d Cong., 1st Sess. § 308(b)(2) (1973)).

Representative Jordan, originator of the mandatory provision,[51] described her amendment to the Act as follows:

> The effect of my amendment . . . is to *require* LEAA *to first* use the same enforcement procedure which applies to any other violation of LEAA regulations or statutes. That procedure of notification hearings and negotiations is spelled out in section 509, which provides the ultimate sanction of funding cutoff if compliance is not obtained.
>
> This amendment was necessary to *reverse* LEAA's traditional reliance on court proceedings to correct discrimination, rather than undertaking administrative enforcement of civil rights requirements.[52]

Despite this statutory language and legislative history, appellees argue that the Crime Control Act provided them "broad enforcement discretion." Although their position is clearly exaggerated, some limited discretion under the statute does exist. Thus, LEAA must "determine" whether a recipient of LEAA funding has failed to comply with the statute's nondiscrimination provision and LEAA regulations. After notifying the recipient state's governor of the noncompliance, LEAA has to determine whether the governor has secured compliance "within a reasonable time." The administrator must then determine whether failure to comply is substantial, at which point some form of fund termination is mandatory.

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[51] Her original amendment made two major changes: it imposed a 60-day time limit on voluntary compliance efforts, after which enforcement action was required, and it replaced the discretionary choice of sanctions permitted under Title VI with mandatory fund termination. Concurrent with termination, the agency could use other enumerated means in its efforts to obtain compliance. 119 CONG. REC. 20,071 (1973) (statement of Rep. Jordan). The Jordan version passed the house, *id.* at 20,105, but was revised in the conference committee to accommodate the views of the Senate, which had approved the President's proposal. The statute which emerged provided for mandatory termination after a "reasonable time" rather than after 60 days, but retained the requirement that, in the words of the conference committee, "LEAA *must* initiate proceedings to cut off funds to any recipient who continues to discriminate after that period, and may, concurrently with that initiation, take other actions." SENATE CONF. REP. NO. 349, 93d Cong., 1st Sess. 32 (1973) (emphasis added).

[52] 119 CONG. REC. 20,071 (1973) (emphasis added).

These limited areas of discretion do not, however, render appellees' statutory obligation so unclear as to entitle them to qualified immunity as a matter of law. Appellants have alleged, with some support, that rampant discrimination existed among recipients of LEAA funds. Many recipient agencies were involved in lawsuits alleging unlawful discrimination.[53] Other recipients reportedly pursued policies that constituted prima facie evidence of discrimination.[54] The few compliance investigations conducted by LEAA allegedly turned up widespread noncompliance.[55] If such allegations are true, LEAA's obligations were clear under the 1973 amendments to the Act. Notification of the state's governor was required, and funding termination proceedings were to be instituted in cases where voluntary compliance failed. Appellants have alleged that very few (perhaps only one) notices to governors were sent, and that funding termination proceedings were never brought prior to commencement of the instant suit. In the words of the House Committee on the Judiciary, "LEAA has never terminated payment of funds to any recipient because of a civil rights violation. Despite positive findings of discrimination by courts and administrative agencies, LEAA has continued to fund violators of the Act." [56]

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[53] "[O]f the 50 largest police departments receiving LEAA funds, 26 were parties to [lawsuits alleging discriminatory practices]." *See* VI COMMISSION REPORT—1974, at 380.

[54] *See id.* at 377-78.

[55] "LEAA staff have stated that the majority of LEAA recipients it has reviewed were found to engage in some form of discriminatory practice." *Id.* at 361 n.968.

Significantly, appellants' allegations of bad faith do not principally involve appellees' exercise of judgment in those areas where appellees contend the Act is ambiguous. Appellants' claims are not based on either appellees' application of the "reasonable time" allowance for effecting voluntary compliance, or the "substantial failure" determination that ultimately makes termination mandatory. Rather, the allegations involve principally the failure of LEAA officials to notify the governors of states where recipients were discriminating, and to institute administrative funding termination proceedings where they had determined that voluntary efforts would not succeed. The purpose of qualified immunity is to protect officials from liability where ambiguity in the law prevents them from knowing how properly to carry out their duties. We do not see how such ambiguity affected the appellees in this case.

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[56] Report of the House Committee on the Judiciary, H.R. Rep. No. 1155, 94th Cong., 2d Sess. 11 (1976). Moreover, in a limited number of cases, LEAA did refer cases to the Justice Department. VI Commission Report—1974, at 383. It is unclear on what basis such action would have been taken unless LEAA believed the recipient was out of compliance. The statute and congressional intent were explicit that, in such circumstances, referral to the Justice Department was to be concurrent with the initiation of fund termination proceedings.

This set of circumstances is presented most clearly with respect to the Philadelphia Police Department. On Feb. 1, 1974, appellee Herbert Rice, Director of LEAA's Office of Civil Rights Compliance, sent the Philadelphia Police Commissioner a mailgram, which stated:

> THIS WILL ALSO FORMERLY [sic] ADVISE YOU THAT LEAA HAS DETERMINED THAT THE PHILADELPHIA POLICE DEPARTMENT HAS FAILED TO COMPLY WITH [THE NONDISCRIMINATION REGULATIONS]. THE LEAA HAS FURTHER DETERMINED THAT COMPLANCE WITH THE REGULATIONS CANNOT BE ACHIEVED BY VOLUNTARY MEANS.
>
> ACCORDINGLY, THIS MATTER HAS BEEN REFERRED TO THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE FOR CONSIDERATION OF THE INSTITUTION OF APPROPRIATE LEGAL PROCEEDINGS.

App. 91. Appellees have not offered a satisfactory explanation for why, in light of the language of § 518(c)(2), funding termination proceedings were not instituted concurrent with the referral of the case to the Justice Department.

It is true, of course, that the enforcement procedures of 518(c)(2) only begin "[w]henever the Administration [LEAA] determines" that a failure to comply exists. This language does not mean, however, that LEAA could avoid its enforcement obligations by refusing to "determine" that noncompliance existed. It is one thing for an agency to proceed cautiously because of the possible consequences of terminating funds. It is something quite different to abdicate the civil rights enforcement role that Congress clearly intended LEAA to play. Appellants have alleged and provided some support showing that unlawful discrimination among funded agencies was rampant and that LEAA officials were aware of that fact. A wholesale refusal to make the determinations clearly contemplated by the Act might well defeat a claim of good faith.

The Fifth Amendment

In addition to any statutory duties appellees may have had, appellants assert that appellees had a constitutional duty not to fund local law enforcement agencies known to be discriminating. Appellants derive this duty from the due process clause of the fifth amendment, which makes applicable to the federal government the equal protection limitations that the fourteenth amendment places on the actions of states. Although appellants will have the burden of establishing several difficult issues of fact,[57] it is a clearly established principle of constitutional law that the federal government may not fund local agencies known to be unconstitutionally discriminating.

Equal protection principles bar federal officials, like state officials, from engaging in racial discrimination.[58] This constitutional obligation applies not just to direct involvement, but also to government "support" of discrimination "through any arrangement, management, funds or property."[59] Activities that the federal government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity.[60] This prohibition encompasses various forms of support that are much less direct than the funding involved in this case.[61]

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[57] *See infra* pp. 25-26 & note 77.

[58] Bolling v. Sharpe, 347 U.S. 497 (1954).

[59] Cooper v. Aaron, 358 U.S. 1, 19 (1958). *See* Norwood v. Harrison, 413 U.S. 455, 467 (1973).

[60] Norwood v. Harrison, 413 U.S. 455, 465 (1973).

[61] Many forms of support have been found unconstitutional in the frequently litigated field of government involvement with segregated schools. *See id.* (free textbooks for racially discriminating private schools); Brown v. South Carolina State Bd. of Educ., 296 F. Supp. 199 (D.S.C.), *aff'd*, 393 U.S. 222 (1968) (state tuition grants to students attending racially discriminatory schools); Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968) (same); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-78 (M.D. Ala.) (same), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967); *cf.* Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (tax exemptions to discriminatory private schools).

As the Court pointed out in *Norwood*, however, equal protection principles do not prohibit the provision of *all* forms of government services provided to discriminatory institutions. 413 U.S. at 465. For example, the Constitution does not pro-

Appellants contend that because their purpose in funding law enforcement agencies is the constitutionally permissible goal of promoting law enforcement, the fact that recipients of their funds discriminate does not make the funding itself unconstitutional. It is clear, however, that a government entity may not fund a discriminating entity simply because the government's purpose is benevolent. In *Norwood v. Harrison*,[62] a case examining the constitutionality of a state providing free textbooks to private schools that practice racial discrimination, the Court emphatically stated, "good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty." [63]

Appellants suggest that these firm constitutional principles, reiterated in *Norwood*, were tacitly changed by the Supreme Court opinions in *Personnel Administrator of Massachusetts v. Feeney*,[64] and *Washington v. Davis*.[65] These cases held that government action that has only a discriminatory effect does not constitute a violation of equal protection guarantees. To establish such a violation, it must also be shown that the government action had an invidiously discriminatory purpose. Appellees contend that the holdings in these cases make it constitutionally permissible for the federal government to fund discriminating agencies so long as the federal government's purpose is not the furtherance of discrimination.[66]

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hibit the provision of generalized services over which the state has an operating monopoly, such as electricity, water, and police and fire protection. *Id.*; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

[62] 413 U.S. 455 (1973).

[63] *Id.* at 466.

[64] 442 U.S. 256, 273-81 (1979).

[65] 426 U.S. 229, 239-41 (1976).

[66] *Cf.* Bob Jones University v. United States, 51 U.S.L.W. 4593, 4606 n.4 (U.S. May 24, 1983) (Rehnquist, J. dissenting) (tax exemption of racially discriminatory schools under facially neutral statute granting general exemption to schools is per-

Feeney and *Davis* addressed completely different issues from the one addressed in *Norwood*, and we do not accept the contention that they implicitly overruled the long-standing principles on which *Norwood* is based. *Feeney* and *Davis* both involved facially neutral government practices that allegedly had a disparate impact on Blacks (*Davis*) and women (*Feeney*).[67] The issues presented were whether disparate impact alone could render unconstitutional a government practice that is neutral on its face. The Court found that such practices were not unconstitutional.

In contrast, *Norwood* is just a recent example of a long line of cases concerning the constitutionality of government involvement in practices which the fifth and fourteenth amendments prohibit the government from engaging in directly.[68] The proper inquiry is whether the

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missible, absent invidiously discriminatory purpose). It is unclear whether Justice Rehnquist, in his lone dissent, premises his conclusion on the view that tax exemptions are not state action. *See* Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970). If, however, Justice Rehnquist intends to extend this principle to clear instances of active state involvement with purposive discriminators, then a number of well-established precedents would have to be overruled. *See, e.g.,* Gilmore v. City of Montgomery, 417 U.S. 556, 573-74 (1974); Norwood v. Harrison, 413 U.S. 455, 466-67 (1973); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-22 (1961); Cooper v. Aaron, 358 U.S. 1, 19 (1958). *See infra* pp. 22-24.

[67] *Davis* involved a written examination administered to applicants for positions in the District of Columbia Police Department. The examination excluded a disproportionate number of Black applicants. 426 U.S. at 234-36. *Feeney* involved a Massachusetts statute which gave qualified veterans an absolute preference over qualified nonveterans in state civil service positions. The statute had an overwhelmingly negative impact on civil service opportunities for women because so few women at the time were veterans. 442 U.S. at 259.

[68] *See, e.g.,* Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-22 (1961); Cooper v. Aaron, 358 U.S. 1, 19 (1958).

relationship between the government and the activity in question is of such nature that the activity will be treated as an action of the government. If so, the issue is whether the government could directly engage in the activity consistent with the Constitution. If not, the government involvement is unconstitutional, regardless of its purpose.[69] We do not suppose that the Supreme Court implicitly changed these firm principles *sub silentio* in *Feeney* and *Davis.*[70]

The distinction between *Feeney* and *Davis* and *Norwood* can be illustrated with reference to the instant case. Appellants allege that agencies receiving LEAA funds practiced unconstitutional discrimination. *Feeney* and *Davis* make clear that for such to be true, the discrimination must be purposeful. If such discrimination does exist, however, the issue then becomes whether funding is a form of involvement that requires us to impute the actions and motives of the local agencies to the federal government. Although some forms of government involvement are sufficiently indirect and complex that they require a careful balancing of factors,[71] the constitutional prohibition on intentional discrimination clearly prohibits the government from funding other agencies engaged in such practices.[72]

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[69] In *Norwood,* for example, the Court pointed out that the district court found that the free textbook program had been established in 1940, long before Brown v. Board of Education, 347 U.S. 483 (1954), had found segregated schools unconstitutional. From this fact, the Supreme Court's analysis proceeded on the assumption that the program was not motivated by an illegally discriminatory purpose.

[70] Appellees' reading of *Feeney* and *Davis* has rather startling implications. It would seem, for example, that their interpretation would allow the federal government to fund directly segregated schools as long as the purpose for doing so was educational rather than discriminatory.

[71] *See, e.g.,* Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (use by segregated private schools of public recreational facilities); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (discrimination by private restaurant in publicly owned facility).

A constitutional violation, moreover, does not arise only when it can be shown that discrimination would not have occurred in the absence of federal funds. As the Court in *Norwood* stated about aid to racially segregated schools, "the Constitution does not permit the state to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school." [73] Thus, in order to establish that a violation has occurred, appellants need not show that a particular instance of discrimination would not have occurred in the absence of federal funding.[74] Such a showing may be relevant in calculating damages, if any, but not to the initial question of whether a violation has occurred.

In stating these principles, two important clarifications are in order. First, the equal protection principles embodied in the fifth amendment only prohibit federal funding of *unconstitutional* discrimination. Statutory and regulatory schemes may prohibit various forms of discrimination that are not constitutionally prohibited.[75] To the extent that appellees' duty to terminate funds is based on constitutional equal protection guarantees, that duty only extends to the funding of local agencies engaged in unconstitutional discrimination.

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[72] *See, e.g.,* Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) (federal funding of discriminatory housing program violates due process); Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C.) (Leventhal, J.) ("Clearly the Federal Government could not under the Constitution give direct financial aid to [institutions] practicing racial discrimination."), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[73] The district court in that case had stressed the absence of a showing that "any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools." 340 F. Supp. 1003, 1013 (1972). The Court found that fact irrelevant in deciding whether a violation had occurred. 413 U.S. at 465 (1972).

[74] In this regard we note, however, the successful experience of some other agencies, particularly HEW, in using fund termination as a method of obtaining compliance. *See* Adams v. Richardson, 480 F.2d 1159, 1163 n.4 (D.C. Cir. 1973) (en banc).

Second, appellees' clearly established duty to terminate funds only existed with respect to recipients that appellees *knew or should have known* [76] were engaged in ongoing unconstitutional discrimination.[77] Such a knowledge requirement is consistent with the purpose of qualified immunity, which is to protect government officials whose limited knowledge prevents them from conducting their duties without committing occasional honest mistakes. The appropriate inquiry involves both a subjective and objective examination of the extent of appellees' knowledge. Such a subjective inquiry is not inconsistent with *Harlow*, which only precludes a subjective inquiry prior to finding that the state of the law allegedly violated was clear. Appellants can use whatever evidence is available through discovery to establish that appellees knew a particular recipient of funds was unconstitutionally discriminating.

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[75] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238-39 (legal standards governing discrimination under Title VII of Civil Rights Act of 1964 are not the same as under fifth amendment).

[76] There is some suggestion in various cases that the fifth amendment imposes a duty on federal officials to police actively recipients of federal funds to ensure that they are not practicing discrimination. *See, e.g.*, NAACP, Western Region v. Brennan, 360 F.Supp. 1006, 1012 (D.D.C. 1973) ("the Fifth Amendment impose[s] upon federal officials not only the duty to refrain from participating in discriminatory practices, but the affirmative duty to police the operations of and prevent such discrimination by State and local agencies funded by them.") We take no position on the existence or extent of any such duty because we conclude that the nature of any such duty is not clearly established. We note, however, that the absence of a clear duty to investigate affirmatively does not protect individuals for actions displaying deliberate indifference to constitutional rights. *See* Carlson v. Green, 446 U.S. 15, 16-17 (1980); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

[77] This issue is, of course, simplified in cases where it is accepted that the activity receiving government support could not be practiced directly by the federal government (*e.g.*, segregated schools). The issue is much more difficult where, as here, any activity that was unconstitutional for appellees to fund was also unconstitutional for the recipients to practice. Because none of the recipients acknowledges participation in un-

CONCLUSION

Under the *Harlow* standard, appellees are entitled to summary judgment regarding appellants' claims for damages under Title VI. With respect to the damage claims under the Crime Control Act and the fifth amendment, however, appellants have alleged violations of "clearly established statutory and constitutional rights." For that reason, we adhere to our rejection of appellees' claim of qualified immunity at this stage of the proceeding. The case is remanded to the district court for further proceedings.

So ordered.

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constitutional activities, appellants will have the difficult burden of establishing that such discrimination existed and that appellees knew of its existence.

TAMM, *Circuit Judge, dissenting*: For the reasons stated in my prior dissenting opinion in this case, 631 F.2d at 791-94, I would hold that the individual defendants are protected by absolute immunity. Accordingly, I respectfully dissent from the majority opinion. Because the *Harlow* standard for qualified immunity does not affect my position on the defendant's absolute immunity, I need not discuss *Harlow*.

Lucky fellow.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1330

D.C. TRANSIT SYSTEM, INC., APPELLANT

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil No. 80-01261)

Argued January 18, 1983

Decided September 20, 1983

Stanley J. Fineman, with whom *C. Francis Murphy* and *Louis P. Robbins* were on the brief, for appellant.

Nathan Dodell, Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys, and *M. Kevin Voyles*, Office of the So-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

licitor, Department of Interior, were on the brief, for appellee.

Before WILKEY and BORK, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge*: This appeal is from the District Court's grant of summary judgment against plaintiff D.C. Transit System on statute-of-limitations grounds. Plaintiff brought this action against the United States to quiet title to certain real property within the District of Columbia under 28 U.S.C. § 2409a (1976). The question presented on appeal is whether D.C. Transit should have known of the government's interest in the property before May 19, 1968, so as to bar the transit company's action under the twelve-year statute of limitations provided for in section 2409a(f).

The District Court on stipulated facts found that plaintiff had constructive notice of the government's claim before that date, and accordingly entered summary judgment for the defendant United States government. Because we find that D.C. Transit had no reason to suspect or even to inquire as to the government's adverse interest in the property before that date, we reverse the District Court judgment and remand the case for further proceedings on the merits of plaintiff's suit.

I

The property in question originally formed part of the Glover-Archbold Parkway, formerly known as Arizona Avenue, in the Georgetown area of the District of Columbia. On December 17, 1968, the District of Columbia passed a municipal resolution closing the parkway, and the corresponding changes in the realty records were recorded in the Surveyor's Office on January 13, 1969.

As owner of two abutting lots on either side of the former street, D.C. Transit claims title to the property under the Street Readjustment Act of the District of Columbia, D.C. CODE ANN. §§ 7-401 to 7-410 (1973) (current version at *id.* (1981)). Section 7-401 of the Act provides:

> The District of Columbia Council is authorized to close any street, road, highway, or alley . . . in the District of Columbia . . . , the title to the land embraced within the public space so closed to revert to the owners of the abutting property . . . .

Id. § 7-401.

The United States claims title to the same property based on language on the closing plat recorded on January 13, 1969, which provides that title to the closed parkway land "shall revert to the United States of America (National Park Service)." This notation effectuated the District government's earlier promise to transfer the abandoned right-of-way to the National Park Service under an agreement executed between the two parties on May 25, 1966. It is the United States' position that the District of Columbia government had power to effect this transfer under section 8-108 of the Parks and Playgrounds provisions of the D.C. Code. *See* D.C. CODE ANN. § 8-108 (1973) (current version at *id.* § 8-104 (1981)).

After learning of the government's claim to the property for the first time in March 1978, D.C. Transit brought this action to quiet title under 28 U.S.C. § 2409a (1976) on May 19, 1980. Section 2409a permits suits against the United States to adjudicate disputed title to real property in which the federal government claims an interest.

Following discovery, the United States moved for summary judgment on the ground that plaintiff's suit was barred by the statute of limitations contained in section 2409a(f). That provision reads:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Id. § 2409a(f). Although the government did not dispute D.C. Transit's lack of actual knowledge before March 1978, it did argue that the transit company should have known of the government's claim by at least January 1967, over thirteen years before suit was filed. The government based its conclusion on two official notices that D.C. Transit received in November 1966 and January 1967, respectively, concerning the proposed street closing.

Relying on these two notices, the District Court found that D.C. Transit should have discovered the United States' adverse interest in the property sometime during 1967. The court accordingly granted the government's motion for summary judgment. *D.C. Transit System, Inc. v. United States*, 531 F. Supp. 808, 814 (D.D.C. 1982).[1]

The first notice to which the District Court referred was mailed to all owners of abutting property during November 1966 announcing that a public hearing would be held the following month to consider objections to the proposed parkway closing. The mailing stated:

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[1] Because the statute of limitations in section 2409a(f) is jurisdictional, *see* Grosz v. Andrus, 556 F.2d 972, 975 (9th Cir. 1977), it would be more proper to characterize the District Court's ruling as a rule 12(b)(1) dismissal for lack of subject matter jurisdiction than as a summary judgment pursuant to rule 56, *see* FED. R. CIV. P. 12(b)(1), 56. Under rule 41(b), a dismissal for lack of jurisdiction does not operate as an adjudication on the merits and therefore is not a proper issue for summary judgment. *See* FED. R .CIV. P. 41(b). Moreover, rule 12(h)(3) requires a court to dismiss an action whenever it appears that the court lacks subject matter jurisdiction. *See* FED. R. CIV. P. 12(h)(3).

> Notice is hereby given that under authority granted in the [Street Readjustment Act], the Commissioners of the District of Columbia will hold a public hearing . . . to determine the question as to any property rights which may be affected or as to the equity, justice or advisability of the [proposed parkway closing].
>
> As owner of property abutting on the area proposed to be closed, you are hereby advised of your privilege to be present at said hearing . . . for the purpose of stating objections, if any, to the closing adjacent to your land.

Letter from Commissioners of the District of Columbia to D.C. Transit Systems, Inc. (Nov. 1966). A similar notice was also published in city newspapers for fourteen days before the hearing in compliance with the public notice and hearing requirements of the Street Readjustment Act. *See* D.C. CODE ANN. § 7-402 (1967) (current version at *id.* (1981)).

At the public hearing held on December 8, 1966, the District Commissioners not only reviewed the proposed closing but also revealed their intention to transfer the abandoned right-of-way to the National Park Service. Maps displayed at the hearing noted that title to the closed parkway land would revert to the United States.

The following month the District government sent a second notice to D.C. Transit setting forth a proposed street-closing order. The proposed order made no mention of the contemplated transfer to the National Park Service, but instead specifically provided that the closing action would be taken under the Street Readjustment Act and that "title to the land comprised in said areas so closed [is] to revert to and/or vest in the abutting property owners as shown on said maps." Letter from the Commissioners of the District of Columbia to D.C. Transit Systems, Inc. (Jan. 3, 1967). The letter asked any party opposing the proposed order to file written objection with the Commissioners within thirty days, as required by section 7-404 of the D.C. Code. *See* D.C. CODE ANN. § 7-404 (1967) (current version at *id.* (1981)).

On February 9, 1967, the Secretary of the Board of Commissioners signed a new draft of the order which took into account objections raised by two parties and which also transferred the right-of-way to the National Park Service upon the roadway's closing. A copy of this new order was not mailed to abutting owners for comment, however, but instead was adopted by the D.C. City Council on December 17, 1968. The closing plat reflecting the City Council's action was recorded in the Surveyor's Office on January 13, 1969. Neither the City Council's final resolution nor the ultimate plat recording are relevant for purposes of this appeal, however, since both occurred after May 18, 1968, or less than twelve years before D.C. Transit filed its suit.

II

Constructive notice of real property interests generally arises from deeds and other instruments properly recorded in the realty records of the controlling jurisdiction. In this case, the United States urges that such notice arose prior to formal recordation. The government bases its conclusion on the two official notices which, it asserts, placed D.C. Transit under a duty of inquiry and which would have led the transit company to discover the government's claim had it attended the hearings or examined the maps referred to in the notices.

The statute-of-limitations language in section 2409a(f) sets out a test of reasonableness governing constructive notice of government real property interests in quiet title actions against the United States. *See Amoco Production Co. v. United States*, 619 F.2d 1383, 1388 (10th Cir. 1980). The section's reach therefore may be broader than that of local recording statutes in certain instances. For example, where a party should have reasonably discovered an adverse property interest asserted by the United States, he will be charged with constructive notice of the government claim even though a local statute does not impute such knowledge to him.

After reviewing the government's arguments and the opinion of the District Court, however, we do not find that the present case falls within this latter category. On the contrary, based on the two notices received by D.C. Transit in 1966 and 1967, a reasonable person would have concluded that the District government intended to transfer the abandoned parkway land to abutting property owners in accordance with the explicit provisions of the Street Readjustment Act. Nothing in the notices suggests the possibility of a contemplated transfer to the National Park Service. D.C. Transit therefore cannot reasonably be charged with constructive knowledge of the government's adverse claim on the basis of the two notices cited by the United States.

A. *The First Notice*

The first notice merely announced a public hearing for the purpose of considering objections to the proposed street closing. The announcement stated that the hearing was being called pursuant to the public notice and comment requirements of the Street Readjustment Act. That Act does not provide for converting public land to park use or for transferring title from one jurisdiction to another; it does provide for closing public streets and for vesting title to abandoned rights-of-way in neighboring landowners.

Although announcement of a public hearing may impart constructive notice of matters discussed at the hearing in certain circumstances, this is true only when the announcement itself clearly sets forth the subjects to be discussed and the public officials' purpose for calling the hearing in the first instance. *See Daley v. Judge of District Court of Western Hampden*, 304 Mass. 86, 23 N.E.2d

1 (1939) (announcement of hearing to consider temporary suspension of police chief did not impart constructive notice of removal proceedings actually conducted at the hearing). Because the District Commissioners' notice failed to disclose their intent to convert the abandoned roadway to park use or to transfer title to the National Park Service, constructive notice of these matters cannot fairly be imputed to D.C. Transit, even though the proposed conversion and title transfer were later actually raised and debated at the hearing.

The case law cited by the District Court in its opinion is not to the contrary. For example, in *United States Trust Co. v. David*, 36 App. D.C. 549 (1911), this Court charged a bank with constructive notice of the contents of a bankruptcy petition referred to in receivership-appointment papers delivered to the bank. We based our holding, however, on the bank's negligent failure to investigate circumstances surrounding the bankruptcy that had already aroused the bank's suspicions and caused it to delay processing the receiver's demand for the bankrupt's deposits. *Id.* at 556-58. The present case presents no parallel, because there were no suspicious circumstances known to D.C. Transit at the time that might have placed the company under a similar duty of inquiry.[2]

Equally inapposite are *Booth Fisheries Corp. v. Coe*, 114 F.2d 462 (D.C. Cir.), *cert. denied*, 311 U.S. 691 (1940), and *Washington Association for Children & Tele-*

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[2] We assume that D.C. Transit at this point favored the proposed street closing because of the false impression created by the first notice that title would revert to abutting property owners under the Street Readjustment Act. The company therefore had no reason to attend the hearing to voice objections to the Board of Commissioners' proposal. Although self-interest might have led the company to attend the hearing anyway (either to ensure that the proposal passed or to see that boundaries were correctly drawn), there is no basis for imposing a legally enforceable duty of inquiry in this case, absent suspicious circumstances calling attention to the need for further investigation.

vision v. FCC, 665 F.2d 1264 (D.C. Cir. 1981). In *Booth Fisheries*, this Court merely charged a patent-holder with constructive knowledge of the content of his own patent. *See* 114 F.2d at 463 & n.3 (citing *Ives v. Sargent*, 119 U.S. 652 (1887), which stands for the same proposition). In *Washington Association for Children & Television*, we held a petitioner before the FCC to constructive knowledge of public notices issued by the agency. *See* 665 F.2d at 1270-71. Whatever the significance of that decision for FCC notification procedures, it stands for the unobjectionable principle that an interested party is chargeable with constructive knowledge of properly issued public notices impinging on its interests. In the present case, D.C. Transit not only had constructive knowledge of the public notices issued with respect to its property—it had actual knowledge of them as well. The issues are what information those notices conveyed and whether they placed the company under a further duty of inquiry. The *Washington Association* decision had no opportunity to consider these questions because the public notices in question there clearly stated the information they sought to convey and left no need for the petitioner to inquire further as to their meaning.[3]

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[3] The various other decisions cited by the District Court likewise bear no analogy to the present case. In Livingston v. Maryland Ins. Co., 11 U.S. (7 Cranch) 506, 509, 538 (1813), the United States Supreme Court held an insurer to constructive notice of the contents of an insurance application previously considered and rejected by the company and later referred to in a second, successful application. In Wood v. Carpenter, 101 U.S. 135, 139-40 (1879), the Supreme Court charged a creditor and judgment-holder with constructive knowledge of various judgments and realty conveyances affecting its debtor's properties, which had been formally recorded in the applicable public records long before suit was filed. Finally, in Rosenthal v. J. Leo Kolb, Inc., 97 A.2d 925, 926-27 (D.C. 1953), the Municipal Court of Appeals for the District of Columbia held a purchaser of real property to constructive notice of a lease agreement in force at the time of purchase and expressly binding on the assigns of the previous owner.

B. *The Second Notice*

The second notice set forth a proposed street-closing order for the parkway and asked interested parties to file any objections within thirty days. This notice was, if anything, more misleading than the first, for besides stating that the closing would be effected under the Street Readjustment Act, the order specifically provided that "title to the land comprised in said areas so closed [is] to revert to and/or vest in the abutting property owners as shown on said maps." The problem is that the referenced maps which were not mailed out with the notice showed title reverting to the National Park Service, not to neighboring landowners, in direct contradiction to the order's language.

Documents incorporated by reference into a public notice may impart constructive knowledge of their contents in many circumstances, but they may not be used to correct fundamental errors in the notice itself unless the notice expressly so warns. *Fry v. City of Salem*, 84 Or. 184, 164 P. 715 (1917). Had the Commissioners' proposed order stated that title to the closed roadway land would revert to abutting property owners *except* as shown on said maps, then constructive notice of the National Park Service's property interest might properly be imputed to D.C. Transit. As matters stand, however, the map reference in the proposed order appears merely to show how title was to revert to neighboring landowners, not whether it would or not.

The case for constructive notice becomes even weaker when one considers the proviso in section 7-401 of the Street Readjustment Act. The general rule of the section is that title to an abandoned roadway automatically reverts to abutting property owners upon street closing. D.C. CODE ANN. § 7-401 (1967) (current version at *id.* (1981)). The proviso sets out an exception to this rule for cases in which the United States rather than the District of Columbia holds title to the roadway land prior to closing. In such cases, title does not revert upon closing to abutting owners but instead passes to the District of Columbia government to dispose of the property as it deems fit. *Id. See generally Carr v. District of Columbia*, 371 F. Supp. 293, 297 (D.D.C. 1974), *modified on other grounds*, 543 F.2d 917 (D.C. Cir. 1976).

The parties are agreed that the underlying roadbed belonged to the District of Columbia in 1966 when it agreed to transfer the land to the National Park Service. Under the terms of section 7-401, this promised transfer had to occur prior to the parkway closing in order for title to pass to the Park Service; otherwise, title automatically reverted upon closing to abutting property owners.[4] Once title was transferred to the Park Service, however, it could not revert to abutting property owners even though the District government subsequently closed the street.[5]

Against this background, the statement in the proposed order that title would revert to abutting owners upon closing is incongruous. It suggests not only that title would pass to D.C. Transit in the normal course of events, but also that the United States had no claim to the land at that time. Thus, besides providing no notice of the government's interest, the proposed order appears to foreclose even the hypothetical possibility that such an interest might exist. Under these circumstances, this Court is most hesitant to ascribe constructive notice of the United States' property interest to D.C. Transit on the basis of the second notice mailed to it in January 1967.[6]

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[4] We emphasize that our discussion addresses the issue of constructive notice only and is not meant to determine the merits of the underlying property dispute at issue in this case. In this light, our discussion serves the limited purpose of demonstrating how title had to have passed to the National Park Service if the parkway was in fact closed under the exclusive authority of the Street Readjustment Act, as the second notice suggested. We, of course, express no opinion as to whether the District of Columbia government might have achieved the results it sought under other statutory authority, such as the Parks and Playgrounds provisions of the D.C. Code. *See, e.g.*, D.C. CODE ANN. § 8-108 (1967) (current version at *id.* § 8-104 (1981)).

[5] Once the street was closed, abutting owners might acquire title to the underlying land by buying it from the District of Columbia government. (Recall that, upon closing, roadbed land owned by the United States passes to the District.) But there would be no automatic reversion of title to them. Carr v. District of Columbia, 371 F. Supp. at 297.

III

For the reasons outlined above, we reverse the District Court's judgment and remand the case for further proceedings on the merits of plaintiff's suit.

It is so ordered.

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[6] As an alternative ground for upholding the District Court's ruling in its favor, the government argues that D.C. Transit had constructive notice of its interest based on "legislative acts" of the Board of Commissioners. *See* Brief for Appellee at 25-26. The legislative act referred to was the signing by the Board's Secretary of the new draft order on February 9, 1967. D.C. Transit raises doubts about the propriety of the Secretary's actions under District law. *See* Reply Brief for Appellant at 4-5. In addition, there is a question whether, following substantial alterations in the proposed street-closing order, the order had to be resubmitted to abutting property owners for their comments under section 7-404. *See* D.C. CODE ANN. § 7-404 (1967) (current version at *id.* (1981)). We need not reach these questions, however, because it is apparent from the District government's subsequent actions that it did not consider the February 1967 draft a final legislative act. The Secretary's actions therefore cannot impart constructive notice to D.C. Transit as to the contents of the new draft order.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1349

MINORITY EMPLOYEES AT NASA (MEAN),
DIANE A. MOORE, APPELLANTS

v.

JAMES M. BEGGS, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

No. 82-1915

MINORITY EMPLOYEES AT NASA (MEAN),
GLORIA TALIAFERRO, APPELLANTS

v.

JAMES M. BEGGS, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, *et al.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 82-2367

MINORITY EMPLOYEES AT NASA (MEAN),
ROSE MARY FERGUSON, APPELLANTS

v.

JAMES M. BEGGS, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 74-1832)

Argued November 2, 1983

Decided December 20, 1983

Thomas J. Hearity, *Rachel B. Trinder* and *Roderic V.O. Boggs* with whom *Raymond J. Rasenberger*, *Richard J. Flynn* and *Julie D. Nelson* were on the brief for appellants in Nos. 82-1915 and 82-2367. *Joseph M. Sellers* also entered an appearance for appellants in Nos. 82-1915 and 82-2367.

John W. Davis, for appellant in No. 81-1349.

John W. Polk and *Patricia Carter*, Assistant United States Attorneys with whom *Stanley S. Harris*, United States Attorney, *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys, were on the brief for appellees in Nos. 81-1349, 82-1915 and 82-2367. *Kenneth M. Raisler*, Assistant United States Attorney, also entered an appearance for appellees.

Before: TAMM and MIKVA, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*

Opinion PER CURIAM.

Per Curiam: These consolidated appeals arise from a lawsuit alleging employment discrimination which the three individual appellants and the organization Minority Employees at NASA (MEAN) filed against NASA in 1974. After the lawsuit was certified as a class action, the parties entered into a Stipulation of Settlement and Consent Order (the Settlement) which the district court approved in 1978. The Settlement provided class-wide relief and procedures for resolving fourteen individual claims of racial discrimination. The only issues currently before the court involve the resolution of three of those individual claims. Pursuant to the Settlement, appellants' claims were tried before a U.S. Magistrate who recommended judgment for NASA in all three cases. The district court adopted the magistrate's findings of fact and conclusions of law in their entirety. All three appellants challenge dismissal of their individual Title VII claims. They also join together in challenging the magistrate's order, approved by the district court, which limited the substantive scope of discovery permitted in the individual discrimination cases.

We conclude that the district court's order limiting the substantive scope of discovery was incorrect as a matter of law. Because the discovery limitation may have denied appellant Gloria Taliaferro access to information that was central to her claim of disparate treatment, we remand her claim for further proceedings. Our reversal of the court's discovery order, however, does not affect the claims of appellants Diane Moore and Rose Mary Ferguson. Neither Ms. Moore nor Ms. Ferguson demonstrated how reversal of the discovery order might lead to the discovery of information which could alter the magistrate's conclusions. In fact, Ms. Ferguson apparently does not dispute the government's claim that she never even filed any requests for answers to interrogatories or for production of documents. Accordingly, we affirm the district court's orders dismissing the claims of appellants Moore and Ferguson. The magistrate's findings of fact in those two cases, adopted in full by the district court, are not clearly erroneous and therefore must be upheld. *See* Fed. R. Civ. P. 52(a); *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 835 (D.C. Cir. 1977).

THE DISCOVERY ORDER

The Settlement authorized fourteen named individuals to bring discrimination claims against NASA pursuant to specified procedures. Two additional claimants subsequently were added to the list by order of the district court. Pursuant to those procedures, nine of the sixteen claimants filed formal claims with a Special Master (the magistrate) who was appointed by the district court. The Settlement expressly limited both the time in which discovery could be taken and the number of depositions, interrogatories, and requests for production of documents permitted "as of right." *See* Settlement Sections XIII C (4)-(6) at Joint Appendix (JA) 12. All of the claimants filed requests for discovery beyond that permitted as of right under the Settlement. While these motions to compel discovery were before the magistrate, NASA filed a comprehensive statement arguing that the Settlement limited discovery to information relating to the specific positions and specific individual involved in a given claim. The magistrate agreed with NASA's general characterization of the Settlement. He issued an order limiting claimants' discovery of statistical and other comparative information to that which was "*directly* relevant to individual claims . . . and confined to the department, division, or section in which the alleged discrimination occurred." JA 70 (emphasis in original). Following a motion for reconsideration by the claimants, the district court upheld the magistrate's interpretation of the Settlement.

Because the order limiting discovery was based on the magistrate's construction of the Settlement and did not constitute an exercise of his discretion, the order poses a legal question which we must review *de novo* on appeal. It is undisputed that the purpose of the Settlement was to "avoid unnecessary litigation" and to place explicit procedural limitations on the scope of discovery permitted each individual claimant. *See* Settlement, Sections I, III (C)(4)-(6) at JA 3, 12. But the magistrate improperly inferred from those limitations that the parties also intended to limit the substantive scope of discovery. His conclusion rested in large part on a sentence in the Settlement which provided that any information sought through "a request for production of documents or set of interrogatories . . . *be relevant to the claim of the individual claimant.*" *Id.*, Section XIII(C)(6) at JA 12 (emphasis added). The magistrate concluded that this "relevance" requirement limited the substantive scope of discovery otherwise permissible under the Federal Rules of Civil Procedure: "It is apparent . . . that if . . . all discovery relevant to any Title VII action in the federal courts were permitted, both the purposes behind this stipulation and the reasons for entering into settlement agreements, in general, would be defeated." JA 68.

We disagree wth the magistrate's interpretation of the Settlement. The primary flaw in his analysis was his failure to reconcile the relevance requirement with another section of the Settlement which provided that the individual discrimination claims "be resolved in accordance with the law governing Title VII actions in the federal courts." Settlement, Section XIII(C)(3) at JA 12. A brief overview of the plaintiff's burden of proof in an individual Title VII case provides some insight into the meaning of this provision of the Settlement.

Although the plaintiff bears the ultimate burden of proof in a disparate treatment case, the Supreme Court has set forth "intermediate evidentiary burdens . . . to bring the litigants and the court expeditiously and fairly to th[e] ultimate question [of intentional discrimination]." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The plaintiff has the initial burden of demonstrating by a preponderance of the evidence a *prima facie* case of discrimination. This burden is not onerous, and creates a rebuttable presumption of discrimination. *Id.* at 253-54. *See McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1973) (describing the factors that go into making a *prima facie* case of intentional discrimination). The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for its action. This is a burden of *production of evidence,* not of persuasion, and rebuts the presumption created by the plaintiff's *prima facie* case. Once the employer has produced evidence of a legitimate reason for its action, the burden shifts back to the plaintiff to prove that the articulated reasons are a pretext for discrimination. "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine,* 450 U.S. at 256.

It is well established that statistical data and comparative information concerning an employer's treatment of minorities is relevant evidence in an individual discrimination claim against that employer. Such evidence can be used by a plaintiff to make out a *prima facie* case of discrimination or to show that the employer's stated reasons for the challenged actions are a pretext for discrimination. *See McDonnell Douglas,* 411 U.S. at 804-05 (statistical evidence concerning an employer's "general policy and practice with respect to minority employment" can be used to prove pretext) (footnote omitted). This court has held that "statistical evidence may establish a *prima facie* case of employment discrimination in an individual case" even though such data is generally used in class action cases to show a pattern or practice of discrimination. *Califano v. Davis,* 613 F.2d 957, 962 (D.C. Cir. 1979). Numerous other cases have held that statistical and comparative information are relevant in proving an individual claim of discrimination.

See, e.g., Lynn v. Regents of the University of California, 656 F.2d 1337, 1342-43 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982); *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 839 (D.C. Cir. 1977); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 344-45 (10th Cir. 1975). Statistical and other comparative information is clearly "relevant to the claim" of an individual plaintiff in a Title VII case. In light of the express provision in the Settlement that Title VII law should apply to the resolution of the individual claims, the district court erred when it approved the magistrate's construction of the settlement, thereby preventing claimants from using such information.

GLORIA TALIAFERRO'S CLAIM

Gloria Taliaferro is the only appellant who has shown that the magistrate's improper limitation on discovery denied her information that was critical to proving her discrimination claim. Ms. Taliaferro, an outspoken civil rights activist at NASA, was recommended for promotion in 1972 and 1973. Both years she was denied promotions and she alleges that those denials constituted unlawful racial discrimination. The magistrate concluded that Ms. Taliaferro had made out a *prima facie* case of discrimination but failed to prove that the reasons offered by NASA to explain its failure to promote her were pretextual. We cannot say that his findings, based on the evidence before him, were clearly erroneous. But the effect of the discovery order was to deny Ms. Taliaferro information that could be highy probative of whether NASA's articulated reasons were a pretext for discrimination.

NASA did not dispute that appellant was qualified for a promotion, but offered two other reasons to explain its failure to promote her. NASA's primary justification was that Ms. Taliaferro's position lacked "promotion potential" under the civil service rules and that her position had to be reclassified before she could be promoted.

NASA also relied on an agency-wide hiring and promotion freeze during the relevant time period to explain its decision not to promote her.

Appellant worked in a department at NASA Headquarters which had fewer than ten employees during the relevant time period. To prove that NASA's stated reasons for failing to promote her were pretextual, appellant made discovery requests concerning white employees outside her department who were promoted in 1972 and 1973. If NASA promoted white employees without promotion potential or during the hiring freeze, this information would be highly relevant to Ms. Taliaferro's claim of intentional discrimination. But the discovery order precluded her from obtaining that information. This erroneous interpretation of the Settlement precluded Ms. Taliaferro from obtaining comparative information that goes to the heart of her claim against NASA.

CONCLUSION

On remand, the magistrate should consider Ms. Taliaferro's specific discovery requests in light of the proper scope of discovery which we conclude is permitted under the Settlement. We recognize that the magistrate has considerable discretion in ruling on discovery requests. But we emphasize that it is an abuse of discretion to prevent a Title VII plaintiff from obtaining information that is vital to proving a discrimination claim.

We affirm the district court's orders concerning Diane Moore and Rose Mary Ferguson. We vacate the district court's orders limiting the scope of discovery and dismissing Gloria Taliaferro's claim and remand for further proceedings consistent with the opinion.

It is so ordered.

EXTRA EDITION NO. 2

The United States
LAW WEEK

Supreme Court
Opinions

April 15, 1980 • THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. • Volume 48, No. 40

OPINIONS ANNOUNCED APRIL 16, 1980

The Supreme Court decided:

CIVIL RIGHTS — Municipalities

Municipalities sued for damages under 42 U.S.C. §1983 for constitutional violations are not entitled to qualified immunity based on good faith of their officials. (Owen v. City of Independence, Missouri, No. 78-1779) page 4389

CRIMINAL LAW AND PROCEDURE — Sentencing

Imposition on District of Columbia defendant of consecutive sentences for felony-murder and for rape on which felony-murder conviction was predicated was contrary to Congress' intent as evidenced by statutory sentencing scheme, and thus violated defendant's rights under Fifth Amendment's Double Jeopardy Clause. (Whalen v. U.S., No. 78-5471) .... page 4406

PUBLIC LANDS — Carey Act

Carey Act, which "authorizes and empowers" Interior Secretary to contract with states for donation of up to three million acres of desert lands in public domain "as state may cause to be irrigated," neither requires secretary to reserve such acreage for disposition under Act nor obliges him automatically to contract for lands that state has chosen for reclamation. (Andrus v. Idaho, No. 79-260) .... page 4414

Full Text of Opinions

No. 78-1779

George D. Owen, Petitioner,
v.
City of Independence, Missouri, et al.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[April 16, 1980]

Syllabus

After the City Council of respondent city moved that reports of an investigation of the city police department be released to the news media and turned over to the prosecutor for presentation to the grand jury and that the City Manager take appropriate action against the persons involved in the wrongful activities brought out in the investigative reports, the City Manager discharged petitioner from his position as Chief of Police. No reason was given for the dismissal and petitioner received only a written notice stating that the dismissal was made pursuant to a specified provision of the city charter. Subsequently, petitioner brought suit in Federal District Court under 42 U. S. C. § 1983 against the city, the respondent City Manager, and the respondent members of the City Council in their official capacities, alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, and seeking declaratory and injunctive relief. The District Court, after a bench trial, entered judgment for respondents. The Court of Appeals ultimately affirmed, holding that although the city had violated petitioner's rights under the Fourteenth Amendment, nevertheless all the respondents, including the city, were entitled to qualified immunity from liability based on the good faith of the city officials involved.

Held: A municipality has no immunity from liability under § 1983 flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability.

(a) By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 242 U. S. 409, 417. Its language is absolute and unqualified, and no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the statute imposes liability upon *"every person"* (held in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, to encompass municipal corporations) who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." And this expansive sweep of § 1983's language is confirmed by its legislative history.

(b) Where an immunity was well established at common law and where its rationale was compatible with the purposes of § 1983, the statute has been construed to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded respondent city by the Court of Appeals.

(c) The application and rationale underlying both the doctrine whereby a municipality was held immune from tort liability with respect to its "governmental" functions but not for its "proprietary" functions, and the doctrine whereby a municipality was immunized for its "discretionary" or "legislative" activities but not for those which were "ministerial" in nature, demonstrate that neither of these common-law doctrines could have been intended to limit a municipality's liability under § 1983. The principle of sovereign immunity from which a municipality's immunity for "governmental" functions derives cannot serve as the basis for the qualified privilege respondent city claims under § 1983, since sovereign immunity insulates a municipality from unconsented suits altogether, the presence or absence of good faith being irrelevant, and since the municipality's "governmental" immunity is abrogated by the sovereign's enactment of a statute such as § 1983 making it amenable to suit. And the doctrine granting a municipality immunity for "discretionary" functions, which doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality, cannot serve as the foundation for a good-faith immunity under § 1983, since a municipality has no "discretion" to violate the Federal Constitution.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released * * * at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

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(d) Rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the purpose of § 1983 to provide protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials—the injustice, particularly in the absence of bad faith, of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively—are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.

589 F. 2d 335, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), overruled *Monroe* v. *Pape*, 365 U. S. 167 (1961), insofar as *Monroe* held that local governments were not among the "persons" to whom 42 U. S. C. § 1983 applies and were therefore wholly immune from suit under the statute.[1] *Monell* reserved decision, however, on the question whether local governments, although not entitled to an absolute immunity, should be afforded some form of official immunity in § 1983 suits. 436 U. S., at 701. In this action brought by petitioner in the District Court for the Western District of Missouri, the Court of Appeals for the Eighth Circuit held that respondent city of Independence, Mo., "is entitled to qualified immunity from liability" based on the good faith of its officials: "We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice." 589 F. 2d 335, 337–338 (CA8 1978). We granted certiorari. — U. S. — (1979). We reverse.

I

The events giving rise to this suit are detailed in the District Court's findings of fact, 421 F. Supp. 1110 (WD Mo. 1976). On February 20, 1967, Robert L. Broucek, then City Manager of respondent city of Independence, Mo., appointed petitioner George D. Owen to an indefinite term as Chief of Police.[2] In 1972, Owen and a new City Manager, Lyle W. Alberg, engaged in a dispute over petitioner's administration of the police department's property room. In March of that year, a handgun, which the records of the Department's property room stated had been destroyed, turned up in Kansas City in the possession of a felon. This discovery prompted Alberg to initiate an investigation of the management of the property room. Although the probe was initially directed by petitioner, Alberg soon transferred responsibility for the investigation to the City's Department of Law, instructing the City Counselor to supervise its conduct and to inform him directly of its findings.

Sometime in early April 1972, Alberg received a written report on the investigation's progress, along with copies of confidential witness statements. Although the City Auditor found that the police department's records were insufficient to permit an adequate accounting of the goods contained in the property room, the City Counselor concluded that there was no evidence of any criminal acts or of any violation of state or municipal law in the administration of the property room. Alberg discussed the results of the investigation at an informal meeting with several City Council members and advised them that he would take action at an appropriate time to correct any problems in the administration of the police department.

On April 10, Alberg asked petitioner to resign as Chief of Police and to accept another position within the department, citing dissatisfaction with the manner in which petitioner had managed the department, particularly his inadequate supervision of the property room. Alberg warned that if petitioner refused to take another position in the department his employment would be terminated, to which petitioner responded that he did not intend to resign.

On April 13, Alberg issued a public statement addressed to the Mayor and the City Council concerning the results of the investigation. After referring to "discrepancies" found in the administration, handling, and security of public property, the release concluded that "[t]here appears to be no evidence to substantiate any allegations of a criminal nature" and offered assurances that "[s]teps have been initiated on an administrative level to correct these discrepancies." *Id.*, at 1115. Although Alberg apparently had decided by this time to replace petitioner as Police Chief, he took no formal action to that end and left for a brief vacation without informing the City Council of his decision.[3]

While Alberg was away on the weekend of April 15 and 16, two developments occurred. Petitioner, having consulted with counsel, sent Alberg a letter demanding written notice of the charges against him and a public hearing with a reasonable opportunity to respond to those charges.[4] At approxi-

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[1] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] Under § 3.3 (1) of the city's charter, the City Manager has sole authority to "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city. . . ."

[3] Alberg returned from his vacation on the morning of April 17, and immediately met informally with four members of the City Council. Although the investigation of the police department was discussed, and although Alberg testified that he had found a replacement for petitioner by that time, he did not inform the council members of his intention to discharge petitioner.

[4] The letter, dated April 15, 1972, stated in part:

"My counsel . . . have advised me that even though the City Charter may give you authority to relieve me, they also say you cannot do so without granting me my constitutional rights of due process, which includes a written charge and specifications, together with a right to a public hearing and to be represented by counsel and to cross-examine those who may appear against me.

. . . . .

"In spite of your recent investigation and your public statement given to

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mately the same time, City Councilman Paul L. Roberts asked for a copy of the investigative report on the police department property room. Although petitioner's appeal received no immediate response, the Acting City Manager complied with Roberts' request and supplied him with the audit report and witness statements.

On the evening of April 17, 1972, the City Council held its regularly scheduled meeting. After completion of the planned agenda, Councilman Roberts read a statement he had prepared on the investigation.[5] Among other allegations, Roberts charged that petitioner had misappropriated police department property for his own use, that narcotics and money had "mysteriously disappeared" from his office, that traffic tickets had been manipulated, that high ranking police officials had made "inappropriate" requests affecting the police court, and that "things have occurred causing the unusual release of felons." At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor for presentation to the grand jury, and that the City Manager "take all direct and appropriate action" against those persons "involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports." After some discussion, the City Council passed Roberts' motion with no dissents and one abstention.[6]

City Manager Alberg discharged petitioner the very next day. Petitioner was not given any reason for his dismissal; he received only a written notice stating that his employment as Chief of Police was "terminated under the provisions of Section 3.3 (1) of the City Charter."[7] Petitioner's earlier demand for a specification of charges and a public hearing was ignored, and a subsequent request by his attorney for an appeal of the discharge decision was denied by the city on the grounds that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." App. 26–27.

The local press gave prominent coverage both to the City Council's action and petitioner's dismissal, linking the discharge to the investigation.[8] As instructed by the City Council, Alberg referred the investigative reports and witness statements to the Prosecuting Attorney of Jackson County, Mo., for consideration by a grand jury. The results of the audit and investigation were never released to the public, however. The grand jury subsequently returned a "no true bill," and no further action was taken by either the City Council or City Manager Alberg.

II

Petitioner named the city of Independence, City Manager Alberg, and the present members of the City Council in their official capacities as defendants in this suit.[9] Alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, petitioner sought declaratory and injunctive relief, including a hearing on his discharge, backpay from the date of discharge, and attorney's fees. The District Court, after a bench trial, entered judgment for respondents. 421 F. Supp. 1110 (WD Mo. 1976).[10]

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the public press, your relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.

"Such action by you would be in violation of my civil rights as granted by the Constitution and Congress of the United States and you would be liable in damages to me. Further it would be in violation of the Missouri Administrative Procedure Act.

"May I have an expression from you that you do not intend to relieve me or in the alternative give me a written charge and specifications of your basis for your grounds of intention to relieve me and to grant me a public hearing with a reasonable opportunity to respond to the charge and a right to be represented by counsel."

City Manager Alberg stated that he did not receive the letter until after petitioner's discharge.

[5] Roberts' statement, which is reproduced in full at 421 F. Supp., at 1116, n. 2, in part recited:

"On April 2, 1972, the City Council was notified of the existence of an investigative report concerning the activities of the Chief of Police of the City of Independence, certain police officers and activities of one or more other City officials. On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.

"The reports show that numerous firearms properly in the police department custody found their way into the hands of others including undesirables and were later found by other law enforcement agencies.

"Reports whow [*sic*] that narcotics held by the Independence Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department.

"In view of the contents of these reports, I feel that the information in the reports backed up by signed statements taken by investigators is so bad that the council should immediately make available to the news media access to copies of all of these 27 voluminous investigative reports so the public can be told what has been going on in Independence. I further believe that copies of these reports should be turned over and referred to the prosecuting attorney of Jackson County, Missouri for consideration and presentation to the next Grand Jury. I further insist that the City Manager immediately take direct and appropriate action, permitted under the Charter, against such persons as are shown by the investigation to have been involved."

[6] Ironically, the official minutes of the City Council meeting indicate that concern was expressed by some members about possible adverse legal consequences that could flow from their release of the reports to the media. The City Counselor assured the council that although an action might be maintained against any witnesses who made unfounded accusations, "the City does have governmental immunity in this area . . . and neither the Council nor the City as a municipal corporation can be held liable for libelous slander." App. 20–23.

[7] See n. 2, *supra*.

[8] The investigation and its culmination in petitioner's firing received front-page attention in the local press. See, *e. g.*, "Lid Off Probe, Council Seeks Action," Independence Examiner, April 18, 1972, Tr. 25; "Independence Accusation. Police Probe Demanded," Kansas City Times, April 18, 1972, Tr. 25; "Probe Culminates in Chief's Dismissal," Independence Examiner, April 19, 1972; "Police Probe Continues; Chief Ousted," Community Observer, April 20, 1972, Tr. 27.

[9] Petitioner did not join former Councilman Roberts in the instant litigation. A separate action seeking defamation damages was brought in state court against Roberts and Alberg in their individual capacities. Petitioner dismissed the state suit against Alberg and reached a financial settlement with Roberts. See 560 F. 2d 925, 930 (CA8 1977).

[10] The District Court, relying on *Monroe* v. *Pape*, 365 U. S. 167 (1961), and *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973), held that § 1983 did not create a cause of action against the city, but that petitioner could base his claim for relief directly on the Fourteenth Amendment. On the merits, however, the court determined that petitioner's discharge did not deprive him of any constitutionally protected property interest because, as an untenured employee, he possessed neither a contractual nor a *de facto* right to continued employment as Chief of Police. Similarly, the court found that the circumstances of petitioner's dismissal did not impose a stigma of illegal or immoral conduct on his professional reputation, and hence did not deprive him of any liberty interest.

The District Court offered three reasons to support its conclusion: First, because the actual discharge notice stated only that petitioner was "terminated under the provisions of Section 3.3 (1) of the City Charter," nothing

The Court of Appeals initially reversed the District Court. 560 F. 2d 925 (CA8 1977).[11] Although it agreed with the District Court that under Missouri law petitioner possessed no property interest in continued employment as police chief, the Court of Appeals concluded that the city's allegedly false public accusations had blackened petitioner's name and reputation, thus depriving him of liberty without due process of law. That the stigmatizing charges did not come from the City Manager and were not included in the official discharge notice was, in the court's view, immaterial. What was important, the court explained, was that "the official actions of the city council released charges against [petitioner] contemporaneous and, in the eyes of the public, connected with that discharge." *Id.*, at 937.[12]

Respondents petitioned for review of the Court of Appeals' decision. Certiorari was granted, and the case was remanded for further consideration in light of our supervening decision in *Monell* v. *New York City Dept. of Social Services, supra.* 438 U. S. 902 (1978). The Court of Appeals on the remand reaffirmed its original determination that the city had violated petitioner's rights under the Fourteenth Amendment, but held that all respondents, including the city, were entitled to qualified immunity from liability. 589 F. 2d 335 (CA8 1978).

Monell held that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U. S., at 694. The Court of Appeals held in the instant case that the municipality's official policy was responsible for the deprivation of petitioner's constitutional rights: "[T]he stigma attached to [petitioner] in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of [petitioner's] constitutional rights, in violation of section 1983." 589 F. 2d, at 337.[13]

Nevertheless, the Court of Appeals affirmed the judgment of the District Court denying petitioner any relief against the respondent city, stating:

> "The Supreme Court's decisions in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and *Perry* v. *Sindermann*, 408 U. S. 593 (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court decided those two cases two months after the discharge in the instant case. Thus, officials of the City of Independence could not have been aware of [petitioner's] right to a name-clearing hearing in con-

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in his official record imputed any stigmatizing conduct to him. Second, the court found that the City Council's actions had no causal connection to petitioner's discharge, for City Manager Alberg had apparently made his decision to hire a new police chief before the Council's April 17th meeting. Lastly, the District Court determined that petitioner was "completely exonerated" from any charges of illegal or immoral conduct by the City Counselor's investigative report, Alberg's public statements, and the grand jury's return of a "no true bill." 421 F. Supp., at 1121–1122.

As an alternative ground for denying relief, the District Court ruled that the city was entitled to assert, and had in fact established, a qualified immunity against liability based on the good faith of the individual defendants who acted as its agents: "[D]efendants have clearly shown by a preponderance of the evidence that neither they, nor their predecessors, were aware in April 1972, that, under the circumstances, the Fourteenth Amendment accorded plaintiff the procedural rights of notice and a hearing at the time of his discharge. Defendants have further proven that they cannot reasonably be charged with constructive notice of such rights since plaintiff was discharged prior to the publication of the Supreme Court decisions in *Roth* v. *Board of Regents*, [408 U. S. 564 (1972)], and *Perry* v. *Sindermann*, [408 U. S. 593 (1972)]." *Id.*, at 1123.

[11] Both parties had appealed from the District Court's decision. On respondents' challenge to the court's assumption of subject-matter jurisdiction under 28 U. S. C. § 1331, the Court of Appeals held that the city was subject to suit for reinstatement and backpay under an implied right of action arising directly from the Fourteenth Amendment. 560 F. 2d 925, 932–934 (CA8 1977). See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388 (1971). Because the Court of Appeals concluded that petitioner's claim could rest directly on the Fourteenth Amendment, it saw no need to decide whether he could recover backpay under § 1983 from the individual defendants in their official capacities as part of general equitable relief, even though the award would be paid by the city. 560 F. 2d, at 932.

[12] As compensation for the denial of his constitutional rights, the Court of Appeals awarded petitioner damages in lieu of backpay. The court explained that petitioner's termination without a hearing must be considered a nullity, and that ordinarily he ought to remain on the payroll and receive wages until a hearing is held and a proper determination on his retention is made. But because petitioner had reached the mandatory retirement age during the course of the litigation, he could not be reinstated to his former position. Thus the compensatory award was to be measured by the amount of money petitioner would likely have earned to retirement had he not been deprived of his good name by the city's actions, subject to mitigation by the amounts actually earned, as well as by the recovery from Councilman Roberts in the state defamation suit.

The Court of Appeals rejected the municipality's assertion of a good-faith defense, relying upon a footnote in *Wood* v. *Strickland*, 420 U. S. 308, 314–315, n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well"), and two of its own precedents awarding backpay in § 1983 actions against school boards. See *Wellner* v. *Minnesota State Jr. College*, 487 F. 2d 153 (CA8 1973); *Cooley* v. *Board of Educ. of Forrest City School Dist.*, 453 F. 2d 282 (CA8 1972). The court concluded that the primary justification for a qualified immunity—the fear that public officials might hesitate to discharge their duties if faced with the prospect of personal monetary liability—simply did not exist where the relief would be borne by a governmental unit rather than the individual officeholder. In addition, the Court of Appeals seemed to take issue with the District Court's finding of good faith on the part of the City Council: "The city officials may have acted in good faith in refusing the hearing, but lack of good faith is evidenced by the nature of the unfair attack made upon the appellant by Roberts in the official conduct of the City's business. The District Court did not address the good faith defense in light of Roberts' defamatory remarks." 560 F. 2d, at 941.

[13] Although respondents did not cross-petition on this issue, they have raised a belated challenge to the Court of Appeals' ruling that petitioner was deprived of a protected "liberty" interest. See Brief for Respondents 45–46. We find no merit in their contention, however, and decline to disturb the determination of the court below.

Wisconsin v. *Constantineau*, 400 U. S. 433, 437 (1971), held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In *Board of Regents* v. *Roth*, 408 U. S. 564, 573 (1972), we explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and associations in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "occur[red] in the course of the termination of employment." Cf. *Paul* v. *Davis*, 424 U. S. 693, 710 (1976). Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law.

> nection with the discharge. The City of Independence should not be charged with predicting the future course of constitutional law. . . . We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice. We hold the City not liable for actions it could not reasonably have known violated [petitioner's] constitutional rights." *Id.*, at 338 (footnote and citations omitted).[14]

We turn now to the reasons for our disagreement with this holding.[15]

III

Because the question of the scope of a municipality's immunity from liability under § 1983 is essentially one of statutory construction, see *Wood* v. *Strickland,* 420 U. S. 308, 314, 316 (1975); *Tenney* v. *Brandhove,* 341 U. S. 367, 376 (1951), the starting point in our analysis must be the language of the statute itself. *Andrus* v. *Allard,* — U. S. —, — (1979); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 756 (1975) (Powell, J., concurring). By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman,* 424 U. S. 409, 417 (1976). Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the act imposes liability upon *"every person"* who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[16] And *Monell* held that these words were intended to encompass municipal corporations as well as natural "persons."

Moreover, the congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13—the forerunner of § 1983—confirm the expansive sweep of the statutory language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the act was to receive:

> "I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App.).

Similar views of the act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. See *Monell* v. *New York City Dept. of Social Services,* 436 U. S., at 683–687.[17]

However, notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson* v. *Ray,* 386 U. S. 547, 555 (1967). Thus in *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), after tracing the development of an absolute legislative privilege from its source in 16th-century England to its inclusion in the Federal and State Constitutions, we concluded that Congress "would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of § 1983. *Id.,* at 376.

Subsequent cases have required that we consider the personal liability of various other types of government officials. Noting that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," *Pierson* v. *Ray, supra,* at 553–554, held that the absolute immunity traditionally accorded judges was preserved under § 1983. In that same case, local police officers were held to enjoy a "good faith and probable cause" defense to § 1983 suits similar to that which existed in false arrest actions at common law. *Id.,* at 555–557. Several more recent decisions have found immunities of varying scope appropriate for different state and local officials sued under § 1983. See *Procunier* v. *Navarette,* 434 U. S. 555 (1978) (qualified immunity for prison officials and officers); *Imbler* v. *Pachtman,* 424 U. S. 409 (1976) (absolute immunity for prosecutors in initiating and presenting the State's case); *O'Connor* v. *Donaldson,* 422 U. S. 563 (1975) (qualified immunity for superintendent of state hospital); *Wood* v. *Strickland,* 420 U. S. 308 (1975) (qualified immunity for local school board members); *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974) (qualified "good-faith" immunity for state Governor and other executive officers for discretionary acts performed in the course of official conduct).

In each of these cases, our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman, supra,* at 421. Where the immunity claimed by the defendant was well-established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy support a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.[18]

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[14] Cf. *Wood* v. *Strickland,* 420 U. S. 308, 322 (1975) ("Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.").

[15] The Courts of Appeals are divided on the question whether local governmental units are entitled to a qualified immunity based on the good faith of their officials. Compare *Bertot* v. *School Dist. No. 1,* — F. 2d — (CA10 1979) (en banc), *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F. 2d 569 (CA7 1975), and *Handler* v. *San Jacinto Jr. College,* 519 F. 2d 273, rehearing denied, 522 F. 2d 204 (CA5 1975), all refusing to extend a qualified immunity to the governmental entity, with *Paxman* v. *Campbell,* — F. 2d — (CA4 1980) (en banc) and *Sala* v. *County of Suffolk,* 604 F. 2d 207 (CA2 1979), granting defendants a "good-faith" immunity.

[16] See n. 1, *supra.*

[17] As we noted in *Monell* v. *New York City Dept. of Social Services,* see 436 U. S., at 685–686, n. 45, even the opponents of § 1 acknowledged that its language conferred upon the federal courts the entire power that Congress possessed to remedy constitutional violations. The remarks of Senator Thurman are illustrative:

> "[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . .
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> "That is the language of this bill. Whether it is the intent or not I know not, but it is the language of the bill; for there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." Globe App. 216–217.

A

Since colonial times, a distinct feature of our Nation's system of governance has been the conferral of political power upon public and municipal corporations for the management of matters of local concern. As *Monell* recounted, by 1871, municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued in both federal and state courts. See 436 U. S., at 687–688. Cf. *Cowles* v. *Mercer County,* 7 Wall. 118 (1869). Local governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations, as well as for common-law actions for breach of contract.[19] And although, as we discuss below,[20] a municipality was not subject to suit for all manner of tortious conduct, it is clear that at the time § 1983 was enacted, local governmental bodies did not enjoy the sort of "good-faith" qualified immunity extended to them by the Court of Appeals.

As a general rule, it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals:

> "There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 120, at 139 (1869) (hereinafter Shearman & Redfield).

Accord, 2 Dillon § 764, at 875 ("But as respects *municipal corporations proper,* . . . it is, we think, universally considered, even in the absence of statute giving the action, that they are liable for acts of *misfeasance* positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties.") (emphasis in original). See 18 E. McQuillin, Municipal Corporations § 53.02 (3d rev. ed. 1977) (hereinafter McQuillin). Under this general theory of liability, a municipality was deemed responsible for any private losses generated through a wide variety of its operations and functions, from personal injuries due to its defective sewers, thoroughfares, and public utilities, to property damage caused by its trespasses and uncompensated takings.[21]

Yet in the hundreds of cases from that era awarding damages against municipal governments for wrongs committed by them, one searches in vain for much mention of a qualified immunity based on the good-faith of municipal officers. Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful. In the leading case of *Thayer* v. *Boston,* 19 Pick. 511, 515–516 (Mass. 1837), for example, Chief Justice Shaw explained:

> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damages sustained by an individual, in consequence of the acts thus done.

The *Thayer* principle was later reiterated by courts in several jurisdictions, and numerous decisions awarded damages against municipalities for violations expressly found to have been committed in good faith. See, *e. g., Town Council of Akron*

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[18] The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions. In those cases, various government officers had been sued in their individual capacities, and the immunity served to insulate them from personal liability for damages. Here, in contrast, only the liability of the municipality itself is at issue, not that of its officers, and in the absence of an immunity, any recovery would come from public funds.

[19] Primary among the constitutional suits heard in federal court were those based on a municipality's violation of the Contract Clause, and the courts' enforcement efforts often included "various forms of 'positive' relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found." *Monell* v. *New York City Dept. of Social Services, supra,* at 681. Damages actions against municipalities for federal statutory violations were also entertained. See, *e. g., Levy Court* v. *Coroner,* 2 Wall. 501 (1864); *Corporation of New York* v. *Ransom,* 23 How. 487 (1860); *Bliss* v. *Brooklyn,* 3 Fed. Cases 706 (EDNY 1871). In addition, state constitutions and statutes, as well as municipal charters, imposed many obligations upon the local governments, the violation of which typically gave rise to damages actions against the city. See generally Note, Streets, Change of Grade, Liability of Cities for, 30 Am. St. Rep. 835 (1893) and cases cited therein. With respect to authorized contracts—and even unauthorized contracts that are later ratified by the corporation—municipalities were liable in the same manner as individuals for their breaches. See generally 1 J. Dillon, The Law of Municipal Corporations §§ 385, 394 (2d ed. 1873) (hereinafter Dillon). Of particular relevance to the instant case, included within the class of contract actions brought against a city were those for the wrongful discharge of a municipal employee, and where the claim was adjudged meritorious, damages in the nature of backpay were regularly awarded. See, *e. g., Richardson* v. *School Dist. No. 10,* 38 Vt. 602 (1866); *Paul* v. *School Dist. No. 2,* 28 Vt. 575 (1856); *Searsmont* v. *Farwell,* 3 Me. *450 (1825); see generally F. Burke, A Treatise on the Law of Public Schools 81–85 (1880). The most frequently litigated "breach of contract" suits, however, at least in federal court, were those for failure to pay interest on municipal bonds. See, *e. g., The Supervisors* v. *Durant,* 9 Wall. 415 (1869); *Commissioners of Knox County* v. *Aspinwall,* 21 How. 539 (1859).

[20] See *infra,* at 21–26.

[21] See generally C. Rhyne, Municipal Law 729–789 (1957); Shearman & Redfield §§ 143–152; W. Williams, The Liability of Municipal Corporations for Tort (1901) (hereinafter Williams).

v. *McComb,* 18 Ohio 229, 230–231 (1849); *Horton* v. *Ipswich,* 66 Mass. 488, 489, 492 (1853); *Elliot* v. *Concord,* 27 N. H. 204 (1853); *Hurley* v. *Town of Texas,* 20 Wis. 634, 637–638 (1866); *Lee* v. *Villiage of Sandy Hill,* 40 N. Y. 442, 448–451 (1869); *Billings* v. *Worcester,* 102 Mass. 329, 332–333 (1869); *Squiers* v. *Village of Neenah,* 24 Wis. 588, 593 (1869); *Hawks* v. *Charlemont,* 107 Mass. 414, 417–418 (1871).[22]

That municipal corporations were commonly held liable for damages in tort was also recognized by the 42d Congress. See *Monell* v. *New York City Dept. of Social Services, supra,* at 688. For example, Senator Stevenson, in opposing the Sherman amendment's creation of a municipal liability for the riotous acts of its inhabitants, stated the prevailing law: "Numberless cases are to be found where a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." Globe 762.[23] Nowhere in the debates, however, is there a suggestion that the common law excused a city from liability on account of the good faith of its authorized agents, much less an indication of a congressional intent to incorporate such an immunity into the Civil Rights Act.[24] The absence of any allusion to a municipal immunity assumes added significance in light of the objections raised by the opponents of § 1 of the Act that its unqualified language could be interpreted to abolish the traditional good-faith immunities enjoyed by legislators, judges, governors, sheriffs, and other public officers.[25] Had there been a similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the spectre of its destruction, as well.

To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's "governmental" and "proprietary" functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation. The second doctrine immunized a municipality for its "discretionary" or "legislative" activities, but not for those which were "ministerial" in nature. A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality's liability under § 1983.

The governmental-proprietary distinction[26] owed its existence to the dual nature of the municipal corporation. On the one hand, the municipality was a corporate body, capable of performing the same "proprietary" functions as any private corporation, and liable for its torts in the same manner and to the same extent, as well. On the other hand, the municipality was an arm of the State, and when acting in that "governmental" or "public" capacity, it shared the immunity traditionally accorded the sovereign.[27] But the principle of sovereign immunity—itself a somewhat arid fountainhead for municipal immunity[28]—is necessarily nullified when the

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[22] Accord, *Bunker* v. *City of Hudson,* 122 Wis. 43, 54, 99 N. W. 448, 452 (1904); *City of Oklahoma City* v. *Hill Bros.,* 6 Okla. 114, 137–139, 50 P. 242, 249–250 (1897); *Schussler* v. *Board of Comm'rs of Hennepin County,* 67 Minn. 412, 417, 70 N. W. 6, 7 (1897); *McGraw* v. *Town of Marion,* 98 Ky. 673, 680–683, 34 S. W. 18, 20–21 (1896). See generally Note, The Liability of Cities for the Negligence and Other Misconduct of Their Officers and Agents, 30 Am. St. Rep. 376, 405–411 (1893).

Even in England, where the doctrine of official immunity followed by the American courts was first established, no immunity was granted where the damages award was to come from the public treasury. As Baron Bramwell stated in *Ruck* v. *Williams,* 3 Hurlstone & Norman's 308, 320 (1858):

> "I can well understand if a person undertakes the office or duty of a Commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that, if one of several Commissioners does something not within the scope of his authority, the Commissioners as a body are not liable. But where Commissioners, who are a quasi corporate body, are not affected [*i. e.,* personally] by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of the damages, on what principle is it that, if an individual member of the public suffers from an act *bona fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

See generally Shearman & Redfield §§ 133, 178.

[23] Senator Stevenson proceeded to read from the decision in *Prather* v. *Lexington,* 13 Monroe's Ky. Reports 559, 560 (1852):

> "Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. But as a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation, on the subject to which they relate. (*Thayer* v. *Boston,* 19 Pick., 511.) It has also been held that cities are responsible to the same extent, and in the same manner, as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit." Globe 762.

[24] At one point in the debates, Sen. Stevenson did protest that the Sherman amendment would, for the first time, "create a corporate liability for personal injury which no prudence or foresight could have prevented." *Ibid.* As his later remarks made clear, however, Stevenson's objection went only to the novelty of the amendment's creation of vicarious municipal liability for the unlawful acts of private individuals, "even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it." *Monell* v. *New York City Dept. of Social Services, supra,* at 692–693, n. 57.

[25] See, *e. g.,* Globe 365 (remarks of Rep. Arthur) ("But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment, they are liable . . . ."); *id.,* at 385 (remarks of Rep. Lewis); Globe App. 217 (remarks of Sen. Thurman).

[26] In actuality, the distinction between a municipality's governmental and proprietary functions is better characterized not as a line, but as a succession of points. In efforts to avoid the often-harsh results occasioned by a literal application of the test, courts frequently created highly artificial and elusive distinctions of their own. The result was that the very same activity might be considered "governmental" in one jurisdiction, and "proprietary" in another. See 18 McQuillin § 53.02, at 105. See also W. Prosser, Handbook of the Law of Torts § 131, at 979 (4th ed. 1971) (hereinafter Prosser). As this Court stated, in reference to the "'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations":

> "A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Indian Towing Co.* v. *United States,* 350 U. S. 61, 65 (1955) (on rehearing).

[27] "While acting in their governmental capacity, municipal corporations proper are given the benefit of that same rule which is applied to the sovereign power itself, and are afforded complete immunity from civil responsibility for acts done or omitted, unless such responsibility is expressly created by statute. When, however, they are not acting in the exercise of their purely governmental functions, but are performing duties that pertain to the exercise of those private franchises, powers, and privileges which belong to them for their own corporate benefit, or are dealing with property held by them for their own corporate gain or emolument, then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a private corporation under like circumstances." Williams § 4, at 9. See generally 18 McQuillin §§ 53.02, 53.04, 53.24; Prosser § 131, at 977–983; James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 611–612, 622–629 (1955).

[28] Although it has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy, it apparently stems from the personal immunity of the English monarch as expressed in

State expressly or impliedly allows itself, or its creation, to be sued. Municipalities were therefore liable not only for their "proprietary" acts, but also for those "governmental" functions as to which the State had withdrawn their immunity. And, by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligation. See, *e. g., Weightman* v. *Washington,* 1 Black 39, 50–52 (1862); *City of Providence* v. *Clapp,* 17 How. 161, 167–169 (1855). See generally Shearman & Redfield §§ 122–126; Note, Liability of Cities for the Negligence and Other Misconduct of Their Officers and Agents, 30 Am. St. Rep. 376, 385 (1893). Thus, despite the nominal existence of an immunity for "governmental" functions, municipalities were found liable in damages in a multitude of cases involving such activities.

That the municipality's common-law immunity for "governmental" functions derives from the principle of sovereign immunity also explains why that doctrine could not have served as the basis for the qualified privilege respondent claims under § 1983. First, because sovereign immunity insulates the municipality from unconsented suits altogether, the presence or absence of good faith is simply irrelevant. The critical issue is whether injury occurred while the city was exercising governmental, as opposed to proprietary, powers or obligations—not whether its agents reasonably believed they were acting lawfully in so conducting themselves.[29] More fundamentally, however, the municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law[30]—abolished whatever vestige of the State's sovereign immunity the municipality possessed.

The second common-law distinction between municipal functions—that protecting the city from suits challenging "discretionary" decisions—was grounded not on the principle of sovereign immunity, but on a concern for separation of powers. A large part of the municipality's responsibilities involved broad discretionary decisions on issues of public policy—decisions that affected large numbers of persons and called for a delicate balancing of competing considerations. For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government. See *Johnson* v. *State,* 69 Cal. 2d 782, 794, n. 8, 447 P. 2d 352, 361, n. 8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government."). In order to ensure against any invasion into the legitimate sphere of the municipality's policymaking processes, courts therefore refused to entertain suits against the city "either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character." 2 Dillon § 753, at 862.[31]

Although many, if not all, of a municipality's activities would seem to involve at least some measure of discretion, the influence of this doctrine on the city's liability was not as significant as might be expected. For just as the courts implied an exception to the municipality's immuntiy for its "governmental" functions, here, too, a distinction was made that had the effect of subjecting the city to liability for much of its tortious conduct. While the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment. See, *e. g., Hill* v. *Boston,* 122 Mass. 344, 358–359 (1877) (dicta) (municipality would be immune from liability for damages resulting from its decision where to construct sewers, since that involved a discretionary judgment as to the general public interest; but city would be liable for neglect in the construction or repair of any particular sewer, as such activity is ministerial in nature). See generally C. Rhyne, Municipal Law § 30.4, at 736–737 (1957); Williams § 7. Thus municipalities remained liable in damages for a broad range of conduct implementing their discretionary decisions.

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the maxim, "The King can do no wrong." It has been suggested, however, that the meaning traditionally ascribed to this phrase is an ironic perversion of its original intent: "The maxim merely meant that the King was not privileged to do wrong. If his acts were against the law, they were *injuriae* (wrongs). Bracton, while ambiguous in his several statements as to the relation between the King and the law, did not intend to convey the idea that he was incapable of committing a legal wrong." Borchard, Government Liability in Tort, 34 Yale L. J. 1, 2, n. 2 (1924). See also Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act, 45 S. Cal. L. Rev. 131, 142 (1972).

In this country, "[t]he sovereign or governmental immunity doctrine, holding that the state, its subdivisions and municipal entities, may not be held liable for tortious acts, was never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive in his person or property. As a result, the trend of judicial decisions was always to restrict, rather than to expand, the doctrine of municipal immunity." 18 McQuillin § 53.02, at 104 (footnotes omitted). See also Prosser § 131, at 984 ("For well over a century the immunity of both the state and the local governments for their torts has been subjected to vigorous criticism, which at length has begun to have its effect."). The seminal opinion of the Florida Supreme Court in *Hargrove* v. *Town of Cocoa Beach,* 96 So. 2d 130 (1957), has spawned "a minor avalanche of decisions repudiating municipal immunity," Prosser § 131, at 985, which, in conjunction with legislative abrogation of sovereign immunity, has resulted in the consequence that only a handful of States still cling to the old common-law rule of immunity for governmental functions. See K. Davis, Administrative Law of the Seventies § 25.00 (1976 & Supp. 1978) (only two States adhere to the traditional common-law immunity from torts in the exercise of governmental functions); Harley & Wasinger, Government Immunity: Despotic Mantle or Creature of Necessity, 16 Washburn L. Rev. 12, 34–53 (1976).

[29] The common-law immunity for governmental functions is thus more comparable to an absolute immunity from liability for conduct of a certain character, which defeats a suit at the outset, than to a qualified immunity, which "depends on the circumstances and motivations of [the official's] actions, as established by the evidence at trial." *Imbler* v. *Pachtman,* 424 U. S., at 419, n. 13.

[30] Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law. See *Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 455–456 (1976); *Hampton* v. *City of Chicago,* 484 F. 2d 602, 607 (CA7 1973) (Stevens, J.) ("Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.").

[31] See generally 18 McQuillin § 53.04a; Shearman & Redfield §§ 127–130; Williams § 6, at 15–16. Like the governmental/proprietary distinction, a clear line between the municipality's "discretionary" and "ministerial" functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act, 28 U. S. C. § 2680 (a). See generally 3 K. Davis, Administrative Law Treatise § 25.08 (1958 & Supp. 1970).

Once again, an understanding of the rationale underlying the common-law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good-faith immunity under § 1983. That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the muncipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in *Sterling* v. *Constantin,* 287 U. S. 378, 398 (1932), "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

In sum, we can discern no "tradition so well grounded in history and reason" that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights," *Monell* v. *New York City Dept. of Social Services,* 436 U. S., at 685, we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.[32]

B

Our rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Monroe* v. *Pape,* 365 U. S. 167, 184 (1961) (quoting *United States* v. *Classic,* 313 U. S. 299, 326 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape, supra,* at 172.

How "uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were permitted to disavow liability for the injury it has begotten. See *Adickes* v. *Kress & Co.,* 398 U. S. 144, 190 (1970) (opinion of BRENNAN, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, see *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.[33]

Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. See *Robertson* v. *Wegmann,* 436 U. S. 584, 590–591 (1978); *Carey* v. *Piphus,* 435 U. S. 247, 256–257 (1978). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.[34] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.[35] Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. Cf. Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1218–1219 (1977).[36]

Our previous decisions conferring qualified immunities on various government officials, see *supra,* at 13–15, are not to be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. Rather, in each case we concluded that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability. The concerns that justified those decisions, however, are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.[37]

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[32] Cf. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 336 (2d ed. 1973) ("[W]here constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity . . . in order to defeat them.").

[33] The absence of any damages remedy for violations of all but the most "clearly established" constitutional rights, see *Wood* v. *Strickland,* 420 U. S., at 322, could also have the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy, aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined.

[34] For example, given the discussion that preceded the Independence City Council's adoption of the allegedly slanderous resolution impugning petitioner's integrity, see n. 6, *supra,* one must wonder whether this entire litigation would have been necessary had the council members thought that the city might be liable for their misconduct.

[35] Cf. *Albermarle Paper Co.* v. *Moody,* 422 U. S. 405, 417–418 (1975):

"If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States* v. *N. L. Industries, Inc.,* 479 F. 2d 354, 379 (CA8 1973)."

[36] In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute systemwide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the front-line officers are judgment-proof in their individual capacities.

[37] On at least two previous occasions, this Court has expressly recognized that different considerations come into play when governmental

In *Scheuer* v. *Rhodes, supra,* at 240, THE CHIEF JUSTICE identified the two "mutually dependent rationales" on which the doctrine of official immunity rested:

> "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." [38]

The first consideration is simply not implicated when the damage award comes not from the official's pocket, but from the public treasury. It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed, Congress enacted § 1983 precisely to provide a remedy for such abuses of official power. See *Monroe* v. *Pape, supra,* at 171–172. Elemental notions of fairness dictate that one who causes a loss should bear the loss.

It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer* v. *Boston, supra*—"that the city, in its corporate capacity, should be liable to make good the damages sustained by an [unlucky] individual, in consequence of the acts thus done." 19 Pick., at 516. After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. See generally 3 K. Davis, Administrative Law Treatise § 25.17 (1958 and Supp. 1970); Prosser § 131, at 978; Michelman, Property, Utility, and Fairness: Some Thoughts on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).[39]

The second rationale mentioned in *Scheuer* also loses its force when it is the municipality, in contrast to the official, whose liability is at issue. At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy.[40] The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed. First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. See *Kostka* v. *Hogg,* 560 F. 2d 37, 41 (CA1 1977). More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it, "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'être.*" [41]

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rather than personal liability is threatened. *Hutto* v. *Finney,* 437 U. S. 678 (1978), affirmed an award of attorney's fees out of state funds for a deprivation of constitutional rights, holding that such an assessment would not contravene the Eleventh Amendment. In response to the suggestion, adopted by the dissent, that any award should be borne by the government officials personally, the Court noted that such an allocation would not only be "manifestly unfair," but would "def[y] this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to 'exercise their discretion with undue timidity.' *Wood* v. *Strickland,* 420 U. S. 308, 321." *Id.,* at 699, n. 32. The Court thus acknowledged that imposing personal liability on public officials could have an undue chilling effect on the exercise of their decisionmaking responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from public funds.

Our decision in *Lake Country Estates, Inc.* v. *Tahoe Planning Agency,* 440 U. S. 391 (1979), also recognized that the justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself. Petitioners in that case had sought damages under § 1983 from a regional planning agency and the individual members of its governing agency. Relying on *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), the Court concluded that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U. S., at 406. At the same time, however, we cautioned: "If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658." *Id.,* at 405, n. 29.

[38] *Wood* v. *Strickland,* 420 U. S. 308 (1975), mentioned a third justification for extending a qualified immunity to public officials: the fear that the threat of personal liability might deter citizens from holding public office. See *id.,* at 320 ("The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure."). Such fears are totally unwarranted, of course, once the threat of personal liability is eliminated.

[39] *Monell* v. *New York City Dept. of Social Services, supra,* indicated that the principle of loss-spreading was an insufficient justification for holding the municipality liable under § 1983 on a *respondeat superior* theory. 436 U. S., at 693–694. Here, of course, quite a different situation is presented. Petitioner does not seek to hold the city responsible for the unconstitutional actions of an individual official "solely because it employs a tortfeasor." *Id.,* at 691. Rather, liability is predicated on a determination that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.,* at 690. In this circumstance—when it is the local government itself that is responsible for the constitutional deprivation—it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual.

[40] "The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." *Wood* v. *Strickland, supra,* at 319–320.

[41] Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1224 (1977). See also *Johnson* v. *California,* 69 Cal. 2d 782, 792–793, 447 P. 2d 352, 359–360 (1968):

> "Nor do we deem an employee's concern over the potential liability of his employer, the governmental unit, a justification for an expansive definition of 'discretionary,' and hence immune, acts. As a threshold matter, we consider it unlikely that the possibility of government liability will be a serious deterrent to the fearless exercise of judgment by the employee. . . . In any event, however, to the extent that such a deterrent effect takes hold, it may be wholesome. An employee in a private enterprise naturally gives some consideration to the potential liability of his

IV

In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 694.

Reversed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that the city of Independence may be liable in damages for violating a constitutional right that was unknown when the events in this case occurred. It finds a denial of due process in the city's failure to grant petitioner a hearing to clear his name after he was discharged. But his dismissal involved only the proper exercise of discretionary powers according to prevailing constitutional doctrine. The city imposed no stigma on petitioner that would require a "name clearing" hearing under the Due Process Clause.

On the basis of this alleged deprivation of rights, the Court interprets 42 U. S. C. § 1983 to impose strict liability on municipalities for constitutional violations. This strict liability approach inexplicably departs from this Court's prior decisions under § 1983 and runs counter to the concerns of the 42d Congress when it enacted the statute. The Court's ruling also ignores the vast weight of common-law precedent as well as the current state law of municipal immunity. For these reasons, and because this decision will hamper local governments unnecessarily, I dissent.

I

The Court does not question the District Court's statement of the facts surrounding Owen's dismissal. *Ante*, at 2. It nevertheless rejects the District Court's conclusion that no due process hearing was necessary because "the circumstances of [Owen's] discharge did not impose a stigma of illegal or immoral conduct on his professional reputation." 421 F. Supp. 1110, 1122 (WD Mo. 1976); see *ante*, at 10, n. 13. Careful analysis of the record supports the District Court's view that Owen suffered no constitutional deprivation.

A

From 1967 to 1972, petitioner Owen served as Chief of the Independence Police Department at the pleasure of the City Manager.[1] Friction between Owen and City Manager Alberg flared openly in early 1972, when charges surfaced that the Police Department's property room was mismanaged. The City Manager initiated a full internal investigation.

In early April, the City Auditor reported that the records in the property room were so sparse that he could not conduct an audit. The City Counselor reported that "there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room." 560 F. 2d 925, 928 (CA8 1977). In a telephone call on April 10, the City Manager asked Owen to resign and offered him another position in the Department. The two met on the following day. Alberg expressed his unhappiness over the property room situation and again requested that Owen step down. When Owen refused, the City Manager responded that he would be fired. 421 F. Supp., at 1114–1115.

On April 13, the City Manager asked Lieutenant Cook of the Police Department if he would be willing to take over as Chief. Alberg also released the following statement to the public:

> "At my direction, the City Counselor's office, [i]n conjunction with the City Auditor ha[s] completed a routine audit of the police property room.
>
> "Discrepancies were found in the administration, handling and security of recovered property. There appears to be no evidence to substantiate any allegations of a criminal nature. . . ." 560 F. 2d, at 928–929.

The District Court found that the City Manager decided on Saturday, April 15, to replace Owen with Lieutenant Cook as Chief of Police. 421 F. Supp., at 1115. Before the decision was announced, however, City Council Member Paul Roberts obtained the internal reports on the property room. At the April 17 Council meeting, Roberts read a prepared statement that accused police officials of "gross inefficiencies" and various "inappropriate" actions. App. 24. He then moved that the Council release the reports to the public, refer them to the Prosecuting Attorney of Jackson County for presentation to a grand jury, and recommend to the City Manager that he "take all direct and appropriate action permitted under the Charter. . . ." *Id.*, at 25. The Council unanimously approved the resolution.

On April 18, Alberg "implemented his prior decision to discharge [Owen] as Chief of Police." 560 F. 2d, at 929. The notice of termination stated simply that Owen's employment was "[t]erminated under the provisions of Section 3.3 (1) of the City Charter." App. 17. That charter provision grants the City Manager complete authority to remove "directors" of administrative departments "when deemed necessary for the good of the service." Owen's lawyer requested a

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employer, and this attention unquestionably promotes careful work; the potential liability of a governmental entity, to the extent that it affects primary conduct at all, will similarly influence public employees." (Citation and footnote omitted.)

[1] Under § 3.3 (1) of the Independence City Charter in effect in 1972, the City Manager had the power to "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments. . . ." Section 3.8 of that Charter stated that the Chief of Police is the "director" of the Police Department. Charter of the City of Independence, Mo. (Dec. 5, 1961) (hereinafter cited as Charter).

hearing on his client's termination. The Assistant City Counselor responded that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." App. 27.

The City Manager referred to the Prosecuting Attorney all reports on the property room. The grand jury returned a "no true bill," and there has been no further official action on the matter. Owen filed a state lawsuit against Councilman Roberts and City Manager Alberg, asking for damages for libel, slander, and malicious prosecution. Alberg won a dismissal of the state law claims against him, and Councilman Roberts reached a settlement with Owen.[2]

This federal action was filed in 1976. Owen alleged that he was denied his liberty interest in his professional reputation when he was dismissed without formal charges or a hearing. App. 8, 10.[3]

B

Due process requires a hearing on the discharge of a government employee "if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination. . . ." *Codd* v. *Velger*, 429 U. S. 624, 628 (1977) (*per curiam*). This principle was first announced in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), which was decided in June of 1972, 10 weeks *after* Owen was discharged. The pivotal question after *Roth* is whether the circumstances of the discharge so blackened the employee's name as to impair his liberty interest in his professional reputation. *Id.*, at 572–575.

The events surrounding Owen's dismissal "were prominently reported in local newspapers." 560 F. 2d, at 930. Doubtless, the public received a negative impression of Owen's abilities and performance. But a "name clearing" hearing is not necessary unless the employer makes a public statement that "might seriously damage [the employee's] standing and associations in his community." *Board of Regents* v. *Roth*, *supra*, at 573. No hearing is required after the "discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." *Bishop* v. *Wood*, 426 U. S. 341, 348 (1976).

The City Manager gave no specific reason for dismissing Owen. Instead, he relied on his discretionary authority to discharge top administrators "for the good of the service." Alberg did not suggest that Owen "had been guilty of dishonesty, or immorality." *Board of Regents* v. *Roth*, *supra*, at 573. Indeed, in his "property room" statement of April 13, Alberg said that there was "no evidence to substantiate any allegations of a criminal nature." This exoneration was reinforced by the grand jury's refusal to initiate a prosecution in the matter. Thus, nothing in the actual firing cast such a stigma on Owen's professional reputation that his liberty was infringed.

The Court does not address directly the question whether any stigma was imposed by the discharge. Rather, it relies on the Court of Appeals' finding that stigma derived from events "connected with" the firing. *Ante*, at 10–12; 560 F. 2d, at 937. That court attached great significance to the resolution adopted by the City Council at its April 17 meeting. But the resolution merely recommended that Alberg take "appropriate action," and the District Court found no "causal connection" between events in the City Council and the firing of Owen. 421 F. Supp., at 1121. Two days before the Council met, Alberg already had decided to dismiss Owen. Indeed, Councilman Roberts stated at the meeting that the City Manager had asked for Owen's resignation. App. 25.[4]

Even if the Council resolution is viewed as part of the discharge process, Owen has demonstrated no denial of his liberty. Neither the City Manager nor the Council cast any aspersions on Owen's character. Alberg absolved all connected with the property room of any illegal activity, while the Council resolution alleged no wrongdoing. That events focused public attention upon Owen's dismissal is undeniable; such attention is a condition of employment—and of discharge—for high government officials. Nevertheless, nothing in the actions of the City Manager or the City Council triggered a constitutional right to a name-clearing hearing.[5]

The statements by Councilman Roberts were neither measured nor benign, but they provide no basis for this action against the city of Independence. Under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 691 (1978), the city cannot be held liable for Roberts' statements on a theory of *respondeat superior*. That case held that § 1983 makes municipalities liable for constitutional deprivations only if the challenged action was taken "pursuant to official municipal policy of some nature. . . ." As the Court noted, "a municipality cannot be held liable *solely* because it employs a tortfeasor. . . ." *Ibid.* (emphasis in original). The statements of a single councilman scarcely rise to the level of municipal policy.[6]

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[2] In its answer to Owen's complaint in this action, the city cited the state-court action as *Owen* v. *Roberts and Alberg*, Case No. 778,640 (Jackson County, Mo., Circuit Ct.). App. 15.

[3] Owen initially claimed that his property interests in the job also were violated. The Court of Appeals affirmed the District Court's rejection of that contention, 560 F. 2d 925, 937 (CA8 1977), and petitioner has not challenged that ruling in this Court.

The Court suggests that the city should have presented a cross-petition for certiorari in order to argue that Owen has no cause of action. *Ante*, at 10, n. 13. It is well-settled that a respondent "may make any argument presented below that supports the judgment of the lower court." *Hankerson* v. *North Carolina*, 432 U. S. 233, 240, n. 6 (1977); see *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U. S. 479, 480–481 (1976), citing *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435 (1924). The judgment of the Court of Appeals in the instant case was to "deny[] Owen any relief . . ." by finding that the defendants were immune from suit. 589 F. 2d, at 388. Since the same judgment would result from a finding that Owen has no cause of action under the statute, respondents' failure to present a cross-petition does not prevent them from pressing the issue before this Court.

[4] The City Charter prohibits any involvement of Council members in the City Manager's personnel decisions. Section 2.11 of the Charter states that Council members may not "participate in any manner in the appointment or removal of officers and employees of the city." Violation of § 2.11 is a misdemeanor that may be punished by ejection from office.

[5] The Court suggests somewhat cryptically that stigma was imposed on Owen when "the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity." *Ante*, at 10, n. 13. The Court fails, however, to identify any "allegedly false statement." The resolution did call for public disclosure of the reports on the property room situation, but those reports were never released. *Id.*, at 7. Indeed, petitioner's complaint alleged that the failure to release those reports left "a cloud or suspicion of misconduct" over him. App. 8. The resolution also referred the reports to the prosecutor and called on the City Manager to take appropriate action. Neither event could constitute the public release of an "allegedly false statement" mentioned by the Court.

[6] Roberts himself enjoyed absolute immunity from § 1983 suits for acts taken in his legislative capacity. *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U. S. 391, 402–406 (1979). Owen did sue him in state court for libel and slander, and reached an out-of-court settlement. See *supra*, at 4.

As the District Court concluded, "[a]t most, the circumstances . . . suggested that, as Chief of Police, [Owen] had been an inefficient administrator." 421 F. Supp., at 1122. This Court now finds unconstitutional stigma in the interaction of unobjectionable official acts with the unauthorized statements of a lone councilman who had no direct role in the discharge process. The notoriety that attended Owen's firing resulted not from any city policy, but solely from public misapprehension of the reasons for a purely discretionary dismissal. There was no constitutional injury; there should be no liability.[7]

II

Having constructed a constitutional deprivation from the valid exercise of governmental authority, the Court holds that municipalities are strictly liable for their constitutional torts. Until two years ago, municipal corporations enjoyed absolute immunity from § 1983 claims. *Monroe* v. *Pape*, 365 U. S. 167 (1961). But *Monell* v. *New York City Dept. of Social Services, supra*, held that local governments are "persons" within the meaning of the statute, and thus are liable in damages for constitutional violations inflicted by municipal policies. 436 U. S., at 690. *Monell* did not address the question whether municipalities might enjoy a qualified immunity or good-faith defense against § 1983 actions. *Id.*, at 695, 701; *id.*, at 713–714 (POWELL, J., concurring).

After today's decision, municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability. As a policy matter, I believe that strict municipal liability unreasonably subjects local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable.

The Court's decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the States. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit congressional action. Yet today's decision is supported by nothing in the text of § 1983. Indeed, it conflicts with the apparent intent of the drafters of the statute, with the common law of municipal tort liability, and with the current state law of municipal immunities.

A

1

Section 1983 provides a private right of action against "any person" acting under color of state law who imposes or causes to be imposed a deprivation of constitutional rights.[8] Although the statute does not refer to immunities, this Court has held that the law "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976); see *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951).

This approach reflects several concerns. First, the common-law traditions of immunity for public officials could not have been repealed by the "general language" of § 1983. *Tenney* v. *Brandhove, supra*, at 376; see *Imbler* v. *Pachtman, supra*, at 421–424 (1976); *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967). In addition, "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U. S. 232, 241 (1974). Because public officials will err at times, "[t]he concept of immunity assumes . . . that it is better to risk some error and possibly injury from such error than not to decide or act at all." *Id.*, at 242; see *Wood* v. *Strickland*, 420 U. S. 308, 319–320 (1975). By granting some immunity to governmental actors, the Court has attempted to ensure that public decisions will not be dominated by fears of liability for actions that may turn out to be unconstitutional. Public officials "cannot be expected to predict the future course of constitutional law. . . ." *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978).

In response to these considerations, the Court has found absolute immunity from § 1983 suits for state legislators, *Tenney* v. *Brandhove, supra*, judges, *Pierson* v. *Ray, supra*, at 553–555, and prosecutors in their role as advocates for the state, *Imbler* v. *Pachtman, supra*. Other officials have been granted a qualified immunity that protects them when in good faith they have implemented policies that reasonably were thought to be constitutional. This limited immunity extends to police officers, *Pierson* v. *Ray, supra*, at 555–558, state executive officers, *Scheuer* v. *Rhodes, supra*, local school board members, *Wood* v. *Strickland, supra*, the superintendent of a state hospital, *O'Connor* v. *Donaldson*, 422 U. S. 563, 576–577 (1975), and prison officials, *Procunier* v. *Navarette, supra*.

The Court today abandons any attempt to harmonize § 1983 with traditional tort law. It points out that municipal immunity may be abrogated by legislation. Thus, according to the Court, Congress "abolished" municipal immunity when it included municipalities "within the class of 'persons' subject to liability under § 1983." *Ante*, at 24.

This reasoning flies in the face of our prior decisions under this statute. We have held repeatedly that "immunities 'well grounded in history and reason' [were not] abrogated 'by covert inclusion in the general language' of § 1983." *Imbler* v. *Pachtman, supra*, 424 U. S., at 418, quoting *Tenney* v. *Brandhove, supra*, 341 U. S., at 376. See *Scheuer* v. *Rhodes, supra*, 416 U. S., at 243–244; *Pierson* v. *Ray, supra*, 386 U. S., at 554. The peculiar nature of the Court's position emerges when the status of executive officers under § 1983 is compared with that of local governments. State and local executives are personally liable for bad-faith or unreasonable constitutional torts. Although Congress had the power to make those individuals liable for all such torts, this Court has refused to find an abrogation of traditional immunity in a statute that does not mention immunities. Yet the Court now views the enactment of § 1983 as a direct abolition of traditional municipal immunities. Unless the Court is overruling its previous immunity decisions, the silence in § 1983 must mean that the 42d Congress mutely accepted the immunity of executive officers, but silently rejected common-law municipal immunity. I find this interpretation of the statute singularly implausible.

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[7] This case bears some resemblance to *Martinez* v. *California*, — U. S. — (1979) (No. 78-1268), which involved a § 1983 suit against state parole officials for injuries caused by a paroled prisoner. We found that the plaintiffs had no cause of action because they could not show a causal relationship between their injuries and the actions of the defendants. *Id.*, at — (slip op., at 7–8). That relationship also is absent in this case. Any injury to Owen's reputation was the result of the Roberts statement, not the policies of the city of Independence.

[8] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U. S. C. § 1983.

2

Important public policies support the extension of qualified immunity to local governments. First, as recognized by the doctrine of separation of powers, some governmental decisions should be at least presumptively insulated from judicial review. Chief Justice Marshall wrote in *Marbury* v. *Madison,* 1 Cranch 137, 170 (1803), that "[t]he province of the court is . . . not to inquire how the executive or executive officers, perform duties in which they have a discretion." Marshall stressed the caution with which courts must approach "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive." The allocation of public resources and the operational policies of the government itself are activities that lie peculiarly within the competence of executive and legislative bodies. When charting those policies, a local official should not have to gauge his employer's possible liability under § 1983 if he incorrectly—though reasonably and in good faith—forecasts the course of constitutional law. Excessive judicial intrusion into such decisions can only distort municipal decisionmaking and discredit the courts. Qualified immunity would provide presumptive protection for discretionary acts, while still leaving the municipality liable for bad faith or unreasonable constitutional deprivations.

Because today's decision will inject constant consideration of § 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. Only this Term, we noted that the "point" of immunity under § 1983 "is to forestall an atmosphere of intimidation that would conflict with [officials'] resolve to perform their designated functions in a principled fashion." *Ferri* v. *Ackerman,* — U. S. —, — (1980) (No. 78–5981, slip op., at 10).

The Court now argues that local officials might modify their actions unduly if they face personal liability under § 1983, but that they are unlikely to do so when the locality itself will be held liable. *Ante,* at 32–33. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for subjecting the municipality to adverse judgments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability. Cf. *Wood* v. *Strickland,* 420 U. S., at 319–320; *Scheuer* v. *Rhodes,* 416 U. S., at 242.[9]

In addition, basic fairness requires a qualified immunity for municipalities. The good-faith defense recognized under § 1983 authorizes liability only when officials acted with malicious intent or when they "knew or should have known that their conduct violated the constitutional norm." *Procunier* v. *Navarette,* 434 U. S., at 562. The standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk. This idea applies to governmental entities and individual officials alike. Constitutional law is what the courts say it is, and—as demonstrated by today's decision and its precursor, *Monell*—even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled. Municipalities, often acting in the utmost good faith, may not know or anticipate when their action or inaction will be deemed a constitutional violation.[10]

The Court nevertheless suggests that, as a matter of social justice, municipal corporations should be strictly liable even if they could not have known that a particular action would violate the Constitution. After all, the Court urges, local governments can "spread" the costs of any judgment across the local population. *Ante,* at 31–32. The Court neglects, however, the fact that many local governments lack the resources to withstand substantial unanticipated liability under § 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. *E. g.,* Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 958 (1978).[11] By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposes strict liability on the level of government least able to bear it.[12] For some municipalities, the result could be a severe limitation on their ability to serve the public.

B

The Court searches at length—and in vain—for legal authority to buttress its policy judgment. Despite its general statements to the contrary, the Court can find no support for its position in the debates on the civil rights legislation that included § 1983. Indeed, the legislative record suggests that the Members of the 42d Congress would have been dismayed by this ruling. Nor, despite its frequent citation of authorities that are only marginally relevant, can the Court rely on the traditional or current law of municipal tort liability. Both in the 19th century and now, courts and legislatures have recognized the importance of limiting the liability of local governments for official torts. Each of these conventional sources of law points to the need for qualified immunity for local governments.

1

The modern dispute over municipal liability under § 1983 has focused on the defeat of the Sherman amendment during the deliberations on the Civil Rights Act of 1871. *E. g., Monroe* v. *Pape,* 365 U. S., at 187–191; *Monell* v. *New York City Dept. of Social Services,* 436 U. S., at 664–683. Senator Sherman proposed that local governments be held vicariously liable for constitutional deprivations caused by riots within their boundaries. As originally drafted, the measure imposed liability even if municipal officials had no actual knowledge of the impending disturbance.[13] The amendment, which did not affect the part of the Civil Rights Act that we know as § 1983, was approved by the Senate but rejected by the House of Representatives. *Id.*, at 666. After two revisions by conference committees, both Houses passed what is now codified as 42 U. S. C. § 1986. The final version applied not just to local governments but to all "persons," and it imposed no liability unless the defendant knew that a wrong was "about to be committed." [14]

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[9] The Court's argument is not only unpersuasive, but also is internally inconsistent. The Court contends that strict liability is necessary to "create an incentive for officials . . . to err on the side of protecting citizens' constitutional rights." *Ante,* at 28. Yet the Court later assures us that such liability will not distort municipal decisionmaking because "the inhibiting effect is significantly reduced, if not eliminated . . . when the threat of personal liability is removed." *Id.,* at 32–33. Thus, the Court apparently believes that strict municipal liability is needed to modify public policies, but will not have any impact on those policies anyway.

[10] The Court implies that unless municipalities are strictly liable under § 1983, constitutional law could be frozen "in its current state of development." *Ante,* at 28, n. 33. I find this a curious notion. This could be the first time that the period between 1961, when *Monroe* declared local governments absolutely immune from § 1983 suits, and 1978, when *Monell* overruled *Monroe,* has been described as one of static constitutional standards.

[11] For example, in a recent case in Alaska, a jury awarded almost $500,000 to a policeman who was accused of "racism and brutality" and removed from duty without notice and an opportunity to be heard. *Wayson* v. *City of Fairbanks,* No. 77–1851 (Alas. Fourth Dist. Super. Ct., Jan. 24, 1979), *reported in,* 22 ATLA L. Rep. 22 (June, 1979).

[12] Ironically, the State and Federal Governments cannot be held liable for constitutional deprivations. The Federal Government has not waived its sovereign immunity against such claims, and the States are protected by the Eleventh Amendment.

Because Senator Sherman initially proposed strict municipal liability for constitutional torts, the discussion of his amendment offers an invaluable insight into the attitudes of his colleagues on the question now before the Court. Much of the resistance to the measure flowed from doubts as to Congress' power to impose vicarious liability on local governments. *Monell* v. *New York City Dept. of Social Services, supra,* at 673–683; *id.*, at 706 (POWELL, J., concurring). But opponents of the amendment made additional arguments that strongly support recognition of qualified municipal immunity under § 1983.

First, several legislators expressed trepidation that the proposal's strict liability approach could bankrupt local governments. They warned that liability under the proposal could bring municipalities "to a dead stop." Cong. Globe, 42d Cong., 1st Sess., 763 (1871) (Sen. Casserly). See *id.*, at 762 (Sen. Stevenson); 772 (Sen. Thurman). Representative Bingham argued that municipal liability might be so great under the measure as to deprive a community "of the means of administering justice." *Id.*, at 798. Some congressmen argued that strict liability would inhibit the effective operation of municipal corporations. The possibility of liability, Representative Kerr insisted, could prevent local officials from exercising "necessary and customary functions." *Id.*, at 789. See *id.*, at 763 (Sen. Casserly); *id.*, at 808 (Rep. Garfield).

Most significant, the opponents objected to liability imposed without any showing that a municipality knew of an impending constitutional deprivation. Senator Sherman defended this feature of the amendment as a characteristic of riot acts long in force in England and this country. *Id.*, at 760. But Senator Stevenson argued against creating "a corporate liability for personal injury which no prudence or foresight could have prevented." *Id.*, at 762. In the most thorough critique of the amendment, Senator Thurman carefully reviewed the riot acts of Maryland and New York. He emphasized that those laws imposed liability only when a plaintiff proved that the local government had both notice of the impending injury and the power to prevent it. *Id.*, at 771.

> "Is not that right? Why make the county, or town, or parish liable when it had no reason whatsoever to anticipate that any such crime was about to be committed, and when it had no knowledge of the commission of the crime until after it was committed? What justice is there in that?" *Ibid.*

These concerns were echoed in the House of Representatives. Representative Kerr complained that "it is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality." *Id.*, at 788. He denounced the "total and absolute absence of notice, constructive or implied, within any decent limits of law or reason," adding that the proposal "takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either." *Ibid.* Similarly, Representative Willard argued that liability "is only warranted when the community . . . has proved faithless to its duties. . . ." *Id.*, at 791. He criticized the absence of a requirement that it be "prov[ed] in court that there has been any default, any denial, any neglect on the part of the county, city, town, or parish to give citizens the full protection of the laws." *Ibid.*

Partly in response to these objections, the amendment as finally enacted conditioned liability on a demonstration that the defendant knew that constitutional rights were about to be denied. Representative Poland introduced the new measure, noting that "any person *who has knowledge* of any of the offenses named . . . shall [have a] duty to use all reasonable diligence within his power to prevent it." *Id.*, at 804 (emphasis supplied). The same point was made by Representative Shellabarger, the sponsor of the entire Act and, with Representative Poland, a member of the Conference Committee that produced the final draft. *Id.*, at 804–805; see *id.*, at 807 (Rep. Garfield).

On the Senate side, one conferee stated that under the final version

> "in order to make the [municipal] corporation liable as a body it must appear in some way to the satisfaction of the jury that the officers of the corporation, those persons whose duty it was to repress tumult, if they could, had reasonable notice of the fact that there was a tumult, or was likely to be one, and neglected to take the necessary means to prevent it." *Id.*, at 821 (Sen. Edmunds).

Senator Sherman disliked the revised provision. He complained that "before you can make [a person] responsible you have got to show that they had knowledge that the specific wrongs upon the particular person were about to be wrought." *Ibid.*[15]

These objections to the Sherman amendment apply with equal force to strict municipal liability under § 1983. Just as the 42d Congress refused to hold municipalities vicariously liable for deprivations that could not be known beforehand, this Court should not hold those entities strictly liable for deprivations caused by actions that reasonably and in good faith were thought to be legal. The Court's aproach today, like the Sherman amendment, could spawn onerous judgments against local governments and distort the decisions of officers who fear municipal liability for their actions. Congress' refusal to impose those burdens in 1871 surely undercuts any historical argument that federal judges should do so now.

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[13] Congressional Globe, 42d Cong., 1st Sess., at 663 (1871). The proposal applied to any property damage or personal injury caused "by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude. . . ." As revised by the first Conference Committee on the Civil Rights Act, the provision still required no showing of notice. *Id.*, at 749.

[14] The final conference amendment stated:

"That any person or persons having knowledge that any of the wrongs . . . mentioned in the second section of this act, are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured or his legal representatives for all damages caused by any such wrongful act. . . ." *Id.*, at 819.

[15] Under 42 U. S. C. § 1986, the current version of the language approved in place of the Sherman amendment, liability "is dependent on proof of actual knowledge by a defendant of the wrongful conduct. . . ." *Hampton* v. *City of Chicago*, 484 F. 2d 602, 610 (CA7 1973), cert. denied, 415 U. S. 917 (1974).

The Court declares that its rejection of qualified immunity is "compelled" by the "legislative purpose" in enacting § 1983. *Ante*, at 27. One would expect powerful documentation to back up such a strong statement. Yet the Court notes only three features of the legislative history of the Civil Rights Act. Far from "compelling" the Court's strict liability approach, those features of the congressional record provide scant support for its position.

First, the Court reproduces statements by Congressmen attesting to the broad remedial scope of the law. *Ante*, at 13, and n. 17. In view of our many decisions recognizing the immunity of officers under § 1983, *supra*, at 9–10, those statements plainly shed no light on congressional intent with respect to immunity under the statute. Second, the Court cites Senator Stevenson's remark that frequently "a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." *Ante*, at 19, citing Cong. Globe, 42d Cong., 1st Sess., 762 (1871). The Senator merely stated the unobjectionable proposition that municipal immunity could be qualified or abolished by statute. This fragmentary observation provides no basis for the Court's version of the legislative history.

Finally, the Court emphasizes the lack of comment on municipal immunity when opponents of the bill did discuss the immunities of government officers. "Had there been a similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the spectre of its destruction as well." *Ante*, at 20–21. This is but another example of the Court's continuing willingness to find meaning in silence. This example is particularly noteworthy because the very next sentence in the Court's opinion concedes, "To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability." *Id.*, at 21. Since the opponents of the Sherman amendment repeatedly expressed their conviction that strict municipal liability was unprecedented and unwise, the failure to recite the theories of municipal immunity is of no relevance here. In any event, that silence cannot contradict the many contemporary judicial decisions applying that immunity. See *infra*, at 20–21, and nn. 16, 17.

2

The Court's decision also runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions. *E. g.*, 2 J. Dillon, The Law of Municipal Corporations §§ 753, 765, at 862–863, 875–876 (2d ed. 1873); W. Williams, The Liability of Municipal Corporations for Tort 9, 16 (1901). Nineteenth-century courts generally held that municipal corporations were not liable for acts undertaken in their "governmental," as opposed to their "proprietary," capacity.[16] Most States now use other criteria for determining when a local government should be liable for damages. See *infra*, at 24–26. Still, the governmental/proprietary distinction retains significance because it was so widely accepted when § 1983 was enacted. It is inconceivable that a Congress thoroughly versed in current legal doctrines, see *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 669, would have intended through silence to create the strict liability regime now imagined by this Court.

More directly relevant to this case is the common-law distinction between the "discretionary" and "ministerial" duties of local governments. This Court wrote in *Harris* v. *District of Columbia*, 256 U. S. 650, 652 (1921): "When acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character." See *Weightmann* v. *The Corporation of Washington*, 66 U. S. (1 Black) 39, 49–50 (1861). The rationale for this immunity derives from the theory of separation of powers. In *Carr* v. *The Northern Liberties*, 35 Pa. St. 324, 329 (1860), the Pennsylvania Supreme Court explained why a local government was immune from recovery for damage caused by an inadequate town drainage plan.

> "[H]ow careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either. No law allows us to substitute the judgment of the jury, for that of the representatives of the town itself, to whom the business is especially committed by law."

That reasoning, frequently applied in the 19th century,[17] parallels the theory behind qualified immunity under § 1983. This Court has recognized the importance of preserving the autonomy of executive bodies entrusted with discretionary powers. *Scheuer* v. *Rhodes* held that executive officials who have broad responsibilities must enjoy a "range of discretion [that is] comparably broad." 416 U. S., at 247. Consequently, the immunity available under § 1983 varies directly with "the scope of discretion and responsibility of the office. . . ." *Ibid.* Strict municipal liability can only undermine that discretion.[18]

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[16] In the leading case of *Bailey* v. *Mayor & C. of the City of New York*, 3 Hill 531, 539 (NY 1842), the court distinguished between municipal powers "conferred for the benefit of the public" and those "made as well for the private emolument and advantage of the city. . . ." Because the injury in *Bailey* was caused by a water utility maintained for the exclusive benefit of the residents of New York City, the court found the municipality liable "as a private company." *Id.*, at 539. This distinction was construed to provide local governments with immunity in actions alleging inadequate police protection, *Western College of Homeopathic Medicine* v. *City of Cleveland*, 12 Ohio St. 375 (1861), improper sewer construction, *Child* v. *City of Boston*, 86 Mass. (4 Allen) 41 (1862), negligent highway maintenance, *Hewison* v. *City of New Haven*, 37 Conn. 475 (1871), and unsafe school buildings, *Hill* v. *City of Boston*, 122 Mass. 344 (1877).

[17] *E. g.*, *Goodrich* v. *City of Chicago*, 20 Ill. 445 (1858); *City of Logansport* v. *Wright*, 25 Ind. 512 (1865); *Mills* v. *City of Brooklyn*, 32 N. Y. 489, 498–499 (1865); *Wilson* v. *Mayor & C. of City of New York*, 1 Denio 595, 600–601 (N. Y. 1845); *Wheeler* v. *City of Cincinnati*, 19 Ohio St. 19 (1869) (*per curiam*); *City of Richmond* v. *Long's Adm'rs*, 17 Gratt. 375 (Va. 1867); *Kelley* v. *City of Milwaukee*, 18 Wisc. 83 (1864).

[18] The Court cannot wish away these extensive municipal immunities. It quotes two 19th-century treatises as referring to municipal liability for some torts. *Ante*, at 17. Both passages, however, refer to exceptions to the existing immunity rules. The first treatise cited by the Court concedes, though deplores, the fact that many jurisdictions embraced the governmental/proprietary distinction. T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 120, at 140–141 (1869). The same volume notes that local governments could not be sued for injury caused by discretionary acts, *id.*, § 127, at 154, or for officers' acts beyond the powers of the municipal corporation, *id.*, § 140, at 169. The Court's quotation from Dillon on Municipal Corporations stops just before that writer acknowledges that local governments are liable only for injury caused by nondiscretionary acts involving "corporate duties." 2 J. Dillon, The Law of Municipal Corporations, § 764, at 875 (2d ed. 1873). That writer's full statement of municipal tort liability recognizes immunity for both governmental and discretionary acts. Dillon observes that municipal corporations may be held liable only "*where a duty is a corporate one*, that is, one which rests upon the municipality in respect to its special or local interests, and not as a public agency, and is *absolute and perfect*, and not discretionary or judicial in its nature. . . ." *Id.*, at § 778, at 891

The lack of support for the Court's view of the common law is evident in its reliance on *Thayer* v. *Boston,* 36 Mass. 511 (1837), as its principal authority. *Ante,* at 18–19. *Thayer* did hold broadly that a city could be liable for the authorized acts of its officers. 36 Mass., at 516. But *Thayer* was limited severely by later Massachusetts decisions. *Bigelow* v. *Inhabitants of Randolph,* 80 Mass. 541, 544–545 (1860), ruled that *Thayer* applied only to situations involving official malfeasance—or wrongful, bad-faith actions—not to actions based on neglect or nonfeasance. See *Child* v. *City of Boston,* 86 Mass. 41 (1862); *Buttrick* v. *City of Lowell,* 83 Mass. 172 (1861). Finally, *Hill* v. *City of Boston,* 122 Mass. 334, 359 (1877), squarely repudiated the broad holding of *Thayer* and limited municipal liability to acts performed in the proprietary interest of the municipality.[19]

3

Today's decision also conflicts with the current law in 44 States and the District of Columbia. All of those jurisdictions provide municipal immunity at least analogous to a "good faith" defense against liability for constitutional torts. Thus, for municipalities in almost 90% of our jurisdictions, the Court creates broader liability for constitutional deprivations than for state-law torts.

Twelve States have laws creating municipal tort liability but barring damages for injuries caused by discretionary decisions or by the good-faith execution of a validly enacted, though unconstitutional, regulation.[20] Municipalities in those States have precisely the form of qualified immunity that this Court has granted to executive officials under § 1983. Another 11 States provide even broader immunity for local governments. Five of those have retained the governmental/proprietary distinction,[21] while Arkansas and South Dakota grant even broader protection for municipal corporations.[22] Statutes in four more States protect local governments from tort liability except for particular injuries not relevant to this case, such as those due to motor vehicle accidents or negligent maintenance of public facilities.[23] In Iowa, local governments are not liable for injuries caused by the execution with due care of any "officially enacted" statute or regulation.[24]

Sixteen States and the District of Columbia follow the traditional rule against recovery for damages imposed by discretionary decisions that are confided to particular officers or organs of government.[25] Indeed, the leading commentators

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(emphasis in original).

The Court takes some solace in the absence in the 19th century of a qualified immunity for local governments. *Ante,* at 21–27. That absence, of course, was due to the availability of absolute immunity for governmental and discretionary acts. There is no justification for discovering strict municipal liability in § 1983 when that statute was enacted against a background of extensive municipal immunity.

The Court also points out that municipalities were subject to suit for some statutory violations and neglect of contractual obligations imposed by state or federal constitutions. *Ante,* at 16–17. That amenability to suit is simply irrelevant to the immunity available in tort actions, which controls the immunity available under § 1983.

[19] The Court cites eight cases decided before 1871 as "reiterat[ing]" the principle announced in *Thayer* while awarding damages against municipalities for good-faith torts. Three of those cases involved the "special and peculiar" statutory liability of New England towns for highway maintenance, and are wholly irrelevant to the Court's argument. *Billings* v. *Worcester,* 102 Mass. 329, 332–333 (1869); *Horton* v. *Ipswich,* 66 Mass. 448, 491 (1853) (trial court "read to the jury the provisions of the statutes prescribing the duties of towns to keep roads safe . . . and giving a remedy for injuries received from defects in highways"); *Elliot* v. *Concord,* 27 N. H. 204 (1853) (citing similar statute); see 2 J. Dillon, Commentaries on the Law of Municipal Corporation, § 1000, at 1013–1015, and n. 2 (3d ed. 1881). A fourth case, *Town Council of Akron* v. *McComb,* 18 Ohio 229 (1849), concerned damages caused by street-grading, and was later expressly restricted to those facts. *Western College of Homeopthic Medicine* v. *City of Cleveland, supra,* 12 Ohio St., at 378–379. Two of the other cases cited by the Court involved the performance of ministerial acts that were widely recognized as giving rise to municipal liability. *Lee* v. *Village of Sandy Hill,* 40 N. Y. 442, 451 (1869) (liability for damage caused by street-opening when city was under a "duty" to open that street); *Hurley* v. *Town of Texas,* 20 Wis. 634 (1860) (improper tax collection). The seventh case presented malfeasance, or bad-faith acts, by the municipality's agents. *Hawks* v. *Charlemont,* 107 Mass. 414 (1871) (city took material from plaintiff's land to repair bridge). Thus, despite any discussion of *Thayer* in the court opinions, seven of the eight decisions noted by the Court involved thoroughly unremarkable exceptions to municipal immunity as provided by statute or common law. They do not buttress the Court's theory of strict liability.

The Court also notes that Senator Stevenson mentioned *Thayer* during the debates on the Sherman Amendment. *Ante,* at 19, and nn. 23, 24. That reference, however, came during a speech denouncing the Sherman amendment for imposing tort liability on municipal corporations. To reinforce his contention, Senator Stevenson read from the decision in *Prather* v. *City of Lexington,* 52 Ky. 559, 560–652 (1852) which cited *Thayer* for the general proposition that a municipal corporation is not liable on a *respondeat superior* basis for the unauthorized acts of its officers. Cong. Globe, 42d Cong., 1st Sess., at 762 (1871). But the point of the passage in *Prather* read by Senator Stevenson—and the holding of that case—was that "no principle of law . . . subjects a municipal corporation to a responsibility for the safety of the property within its territorial limits." *Ibid.,* quoting *Prather, supra,* at 561. So Stevenson cited *Prather* to demonstrate that municipalities should not be held vicariously liable for injuries caused within their boundaries. *Prather,* in turn, cited *Thayer* for a subsidiary point. Nowhere in this sequence is there any support for the Court's idea that local governments should be subjected to strict liability under § 1983.

[20] Idaho Code § 6–904 (1) (1979); Ill. Rev. Stat., Ch. 85, §§ 2–103, 2–109, 2–201, 2–203 (Hurd 1966); Ind. Code § 34–4–16.5–3 (6) & (8) (1979 Supp.); 1979 Kan. Sess. Laws, Ch. 186, § 4 (including specific exceptions to immunity); Mass. Gen. Laws Ann., Ch. 258, §§ 10 (a), (b) (West Supp. 1979); Minn. Stat. § 466.03 (5) & (6) (1977); Mont. Rev. Codes Ann. §§ 82–4328, 82–4329, 82–4333 (1977 Supp.); Neb. Rev. Stat. § 23–2409 (1) & (2) (1977 Reissue); Nev. Rev. Stat. § 41.032 (1973); N. D. Cent. Code Ann. § 32–12.1–03 (3) (Supp. 1979); Okla. Stat. Ann., Tit. 51, §§ 155 (1)–(5) (Supp. 1979); Ore. Rev. Stat. § 30.265 (3) (c) & (f) (1977).

The Federal Tort Claims Act provides a similar exemption for damage suits against the Federal Government. 28 U. S. C. § 2680 (a). The goal of that provision, according to this Court, is to protect "this discretion of the executive or the administrator to act according to one's judgment of the best course. . . ." *Dalehite* v. *United States,* 346 U. S. 15, 34 (1953).

[21] *Mayor and City Council of Baltimore* v. *Seidel,* 409 A. 2d 747 (Md. Ct. Sp. App. 1980); Mich. Comp. Laws § 691.1407 (Supp. 1979); *Parks* v. *City of Long Beach,* 372 So. 2d 253, 253–254 (Miss. 1979); *Haas* v. *Hayslip,* 51 Ohio St. 2d 135, 139, 364 N. E. 2d 1376, 1379 (1977); *Virginia Electric Power Co.* v. *Hampton Redevelopment & Housing Authority,* 217 Va. 30, 34, 225 S. E. 2d 364, 368 (1976).

[22] Ark. Stat. Ann. § 12–2901 (1979 Repl.); *Shaw* v. *City of Mission,* 88 S. D. 557, 225 N. W. 2d 593 (1975).

[23] 1977 N. M. Laws, Ch. 386, §§ 4–9; Pa. Stat. Ann., Tit. 53, § 5311.202 (b) (Purdon Supp. 1979); *Wright* v. *City of North Charleston,* 271 S. C. 515, 516–518, 248 S. E. 2d 480, 481–482 (1978), see S. C. Code §§ 5–7–70, 15–77–230 (1976); 1979 Wyo. Sess. Laws, Ch. 157, §§ 1–39–105 to 112.

[24] Iowa Code § 613A.4 (3) (1979 Supp.)

[25] Cal. Gov't Code Ann. §§ 815.2, 820.2 (West 1966); *Tango* v. *City of New Haven,* 173 Conn. 203, 204–205, 377 A. 2d 284, 285 (1977); *Biloon's Electrical Serv., Inc.* v. *City of Wilmington,* 401 A. 2d 636, 639–640, 643 (Del. Super. 1979); *Spencer* v. *General Hospital of the District of Columbia,* 425 F. 2d 479, 484 (CADC 1969) (*en banc*); *Commercial Carrier Corp.* v. *Indian River County,* 371 So. 2d 1010, 1020 (Fla. 1979); Ga. Code § 69–302; *Frankfort Variety, Inc.* v. *City of Frankfort,* 552 S. W. 2d 653 (Ky. 1977); Me. Rev. Stat. Ann., Tit. 14, § 8103 (2) (c) (1980); *Merrill* v. *Manchester,* 114 N. H. 722, 729, 332 A. 2d 378, 383 (1974); N. J. Stat. Ann. §§ 59:2–2 (b) and 59:2–3 (West Supp. 1979); *Weiss* v. *Fote,* 7 N. Y. 2d 579, 585–586, 167 N. E. 2d 63, 65–66 (1960); *Calhoun* v. *City of Providence,* 390 A. 2d 350, 355–356 (R. I. 1978); Tenn. Code Ann. § 23–3311 (1) (Supp. 1979); Tex. Rev. Civ. Stat. Ann., Art. 6252–19,

on governmental tort liability have noted both the appropriateness and general acceptance of municipal immunity for discretionary acts. See Restatement (Second) of the Law of Torts, § 895C (2) and comment g (1979); K. Davis, Administrative Law of the Seventies, § 25.13 (1976); W. Prosser, Law of Torts 986–987 (4th ed. 1971). In four States, local governments enjoy complete immunity from tort actions unless they have taken out liability insurance.[26] Only five States impose the kind of blanket liability constructed by the Court today.[27]

C

The Court turns a blind eye to this overwhelming evidence the municipalities have enjoyed a qualified immunity and to the policy considerations that for the life of this Republic have justified its retention. This disregard of precedent and policy is especially unfortunate because suits under § 1983 typically implicate evolving constitutional standards. A good-faith defense is much more important for those actions than in those involving ordinary tort liability. The duty not to run over a pedestrian with a municipal bus is far less likely to change than is the rule as to what process, if any, is due the bus driver if he claims the right to a hearing after discharge.

The right of a discharged government employee to a "name clearing" hearing was not recognized until our decision in *Board of Regents* v. *Roth, supra.* That ruling was handed down 10 weeks after Owen was discharged and eight weeks after the city denied his request for a hearing. By stripping the city of any immunity, the Court punishes it for failing to predict our decision in *Roth*. As a result, local governments and their officials will face the unnerving prospect of crushing damage judgments whenever a policy valid under current law is later found to be unconstitutional. I can see no justice or wisdom in that outcome.

IRVING ACHTENBERG, Kansas City, Mo. (DAVID ACHTENBERG, with him on the brief) for petitioner; RICHARD G. CARLISLE, Independence, Mo., for respondents.

No. 78–5471

Thomas W. Whalen, Petitioner,
v.
United States.

On Writ of Certiorari to the
District of Columbia Court
of Appeals.

[April 16, 1980]

Syllabus

Petitioner was convicted under the District of Columbia Code of the separate statutory offenses of rape and of killing the same victim in the perpetration of the rape. Under the Code, the latter offense is a species of first-degree murder, but the statute, although requiring proof of a killing and of the commission or attempted commission of rape, does not require proof of an intent to kill. Petitioner was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and sentences, rejecting petitioner's contention that his sentence for rape was improper because that offense merged for purposes of punishment with the felony-murder offense, and thus that the imposition of cumulative punishments for the two offenses was contrary to the federal statutes and to the Double Jeopardy Clause of the Fifth Amendment.

Held: The Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and that error denied petitioner his right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress.

(a) The customary deference ordinarily afforded by this Court to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved in this case, because petitioner's claim under the Double Jeopardy Clause, which protects against multiple punishments for the same offense, cannot be separated entirely from a resolution of the question of statutory construction. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.

(b) Neither of the provisions of the District of Columbia Code specifying the separate offenses involved here indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode. However, another Code section, when construed in light of its history and its evident purpose, indicates that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not." The statute embodies in this respect the rule of statutory construction stated in *Blockburger* v. *United States,* 284 U. S. 299, 304, and, in this case, leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that each provision "requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape.

379 A. 2d 1152, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment. BLACKMUN, J., filed an opinion concurring in the judgment. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined.

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. *Whalen* v. *United States,* 379 A. 2d 1152.[1] We brought the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law. — U. S. —.

I

Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code Ann. § 22–2401. It does require proof of a killing and of the commission or attempted commission of rape or of one of five other specified felonies, in the course of which the killing occurred. *Ibid.* A conviction of first-degree murder is punishable in the District of Columbia by imprisonment for a term of 20 years to life. D. C. Code Ann. § 22–2404.[2] Forcible rape of a female is punishable by imprisonment for any term of years or for life. D. C. Code Ann. § 22–2801.

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§ 15 (7) (Vernon 1970); Utah Code Ann. § 63–30–10 (1) (2d Repl. 1978); *King* v. *City of Seattle*, 84 Wash. 2d 239, 246, 525 P. 2d 228, 233 (1974) (en banc); Wis. Stat. § 895.43 (3) (1966).

[26] Colo. Rev. Stat. § 24–10–104 (1973); Mo. Stat. Ann. § 71.185 (Vernon Supp. 1980); N. C. Gen. Stat. § 160A–485 (Repl. 1976); Vt. Stat. Ann., Tit. 29, § 1403 (1970).

[27] Ala. Code, Tit. 11, § 47–190 (1975); *Anderson* v. *State*, 555 P. 2d 248, 251 (Alaska 1976); 1979 Ariz. Sess. Laws, Ch. 185, § 11–981 (A)(2); La. Const., Art. 12, § 10 (a) (West 1974); *Long* v. *City of Weirton*, 214 S. E. 2d 832, 859 (W. Va. 1975). It is difficult to determine precisely the tort liability rules for local governments in Hawaii.

[1] The jury also convicted the petitioner of other felonies, but these convictions were set aside by the District of Columbia Court of Appeals, except for a second-degree murder conviction upon which the petitioner had received a concurrent sentence. The sentence itself was vacated by the appellate court.

It is the petitioner's position that his sentence for the offense of rape must be vacated because that offense merged for purposes of punishment with the felony murder offense, just as, for example, simple assault is ordinarily held to merge into the offense of assault with a dangerous weapon. See *Waller* v. *United States*, 389 A. 2d 801, 808 (D. C. App. 1978). The District of Columbia Court of Appeals disagreed, finding that "the societal interests which Congress sought to protect by enactment [of the two statutes] are separate and distinct," and that "nothing in th[e] legislation . . . suggest[s] that Congress intended" the two offenses to merge. *Whalen* v. *United States*, 379 A. 2d, at 1159. That construction of the legislation, the petitioner argues, is mistaken, and he further argues that, so construed, the pertinent statutes impose on him multiple punishments for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment. Cf. *North Carolina* v. *Pearce*, 395 U. S. 711.

If this case had come here from a United States Court of Appeals, we would as a matter of course first decide the petitioner's statutory claim, and, only if that claim were rejected, would we reach the constitutional issue. See *Simpson* v. *United States*, 435 U. S. 6, 11–12. But this case comes from the District of Columbia Court of Appeals, and the statutes in controversy are Acts of Congress applicable only within the District of Columbia. In such cases it has been the practice of the Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern. See *Pernell* v. *Southall Realty*, 416 U. S. 363, 366; see also *Griffin* v. *United States*, 336 U. S. 704, 717–718; *Fisher* v. *United States*, 328 U. S. 463, 476. This practice has stemmed from the fact that Congress, in creating the courts of the District of Columbia and prescribing their jurisdiction, "contemplate[d] that the decisions of the District of Columbia Court of Appeals on matters of local law—both common law and statutory law—will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." *Pernell* v. *Southall Realty*, *supra*, at 368 (footnote omitted).

But it is clear that the approach described in the *Pernell* opinion is a matter of judicial policy, not a matter of judicial power. Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute. *Id.*, at 368. Cf. *Mullaney* v. *Wilbur*, 421 U. S. 684, 691; *Scripto Inc.* v. *Carson*, 362 U. S. 207, 210; *Murdock* v. *City of Memphis*, 20 Wall. 590, 632–633.

In this case we have concluded that the customary deference to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved, for the reason that the petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction. The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense," *North Carolina* v. *Pearce*, 395 U. S., at 711 (footnote omitted). But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized. See *Gore* v. *United States*, 357 U. S. 386, 390; *id.*, at 394 (Warren, C. J., dissenting on statutory grounds); *Bell* v. *United States*, 349 U. S. 81, 82; *Ex parte Lange*, 18 Wall. 163, 176; see also *Brown* v. *Ohio*, 432 U. S. 161, 165; *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Blockburger* v. *United States*, 284 U. S. 299; *Ebeling* v. *Morgan*, 237 U. S. 625.

It is not at all uncommon, for example, for Congress or a state legislature to provide that a single criminal offense may be punished both by a monetary fine and by a term of imprisonment. In that situation, it could not be seriously argued that the imposition of both a fine and a prison sentence in accordance with such a provision constituted an impermissible punishment. But if a penal statute instead provided for a fine *or* a term of imprisonment upon conviction, a court could not impose both punishments without running afoul of the double jeopardy guarantee of the Constitution. See *Ex parte Lange*, *supra*, at 176. Cf. *Bozza* v. *United States*, 330 U. S. 160, 167. In the present case, therefore, if Congress has not authorized cumulative punishments for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The dispositive question, therefore, is whether Congress did so provide.

The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress. See *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Hudson and Goodwin*, 7 Cranch 32, 34.[3] If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.[4]

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[2] The statute also provides for a sentence of death upon conviction for first-degree murder, but that provision has been held to be unconstitutional. See *United States* v. *Stokes*, 365 A. 2d 615, 616, n. 4 (D. C. App. 1976); *United States* v. *Lee*, — U. S. App. D. C —, 489 F. 2d 1242, 1247 (1973).

[3] This is not to say that there are not constitutional limitations upon this power. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584; *Roe* v. *Wade*, 410 U. S. 113, 164; *Stanley* v. *Georgia*, 394 U. S. 557, 568; *Loving* v. *Virginia*, 388 U. S. 1, 12; *Robinson* v. *California*, 370 U. S. 660, 666–667.

[4] Although the courts of the District of Columbia were created by Congress pursuant to its plenary Art. I power to legislate for the District, see Art. I, § 8, cl. 17; D. C. Code § 11–101 (2), and are not affected by the salary and tenure provisions of Art. III, those courts, no less than other federal courts, may constitutionally impose only such punishments as Congress has seen fit to authorize.

The Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States. *Dreyer* v. *Illinois*, 187 U. S. 71, 84. See *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 615, and n. 13; *Sweezy* v. *New Hampshire* 354 U. S. 234, 255; *id.*, at 255, 256–257 (Frankfurter J., concurring). It is possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority of state courts in the same manner that it limits the power of federal courts. The Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.

Because we have concluded that the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and because that error denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, we reverse the judgment of the Court of Appeals.

II

As has already been noted, rape and the killing of a person in the course of rape in the District of Columbia are separate statutory offenses for which punishments are separately provided. Neither statute, however, indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode. Moreover, the legislative history of those specific penal provisions sheds no light on that question.[5] The issue is resolved, however, by another statute, enacted in 1970. That statute is § 23–112 of the District of Columbia Code, and it provides as follows:

> "A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) *arises out of the same transaction and requires proof of a fact which the other does not.*"

Although the phrasing of the statute is less than felicitious, the message of the italicized clause, we think, is that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not." The clause refers, of course, to a rule of statutory construction stated by this Court in *Blockburger* v. *United States,* 284 U. S. 299, and consistently relied on ever since to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.[6] The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent. In the *Blockburger* case the Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States, supra,* at 304. See also *Brown* v. *Ohio, supra,* at 166; *Ianelli* v. *United States,* 420 U. S. 770; *Gore* v. *United States,* 357 U. S. 386.

The legislative history rather clearly confirms that Congress intended the federal courts to adhere strictly to the *Blockburger* test when construing the penal provisions of the District of Columbia Code. The House Committee Report expressly disapproved several decisions of the United States Court of Appeals for the District of Columbia that had not allowed consecutive sentences notwithstanding the fact that the offenses were different under the *Blockburger* test. See H. R. Rep. No. 91–907, 91st Cong., 2d Sess., 114 (1970). The Report restated the general principle that "whether or not consecutive sentences may be imposed depends on the intent of Congress." *Ibid.* But "[s]ince Congress in enacting legislation rarely specifies its intent on this matter, the courts have long adhered to the rule that Congress did intend to permit consecutive sentences . . . when each offense " 'requires proof of a fact which the other does not,' " *id.,* citing *Blockburger* v. *United States, supra,* and *Gore* v. *United States, supra.* The Committee Report observed that the United States Court of Appeals had "retreated from this settled principle of law" by requiring specific evidence of congressional intent to allow cumulative punishments, *ibid.,* and the Report concluded as follows:

> "To obviate the need for the courts to search for legislative intent, section 23–112 clearly states the rule for sentencing on offenses arising from the same transaction. For example, a person convicted of entering a house with intent to steal and stealing therefrom shall be sentenced consecutively on the crimes of burglarly and larceny unless the judge provides to the contrary."

We think that the only correct way to read § 23–112, in the light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule for construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed "shall, unless the court expressly provides otherwise, run consecutively." [7] And where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.

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[5] Before 1962, conviction of first-degree murder in the District of Columbia led to a mandatory sentence of death by hanging. See Act of Mar. 3, 1901, ch. 854, § 801, 31 Stat. 1321. Accordingly, the question did not arise whether the sentence for another felony could run consecutively to that for first-degree murder. In 1962 Congress replaced the mandatory death penalty with the present language of D. C. Code Ann. § 22–2404, which allows, as an alternative to a penalty of death, a sentence of 20 years to life imprisonment. Act of Mar. 22, 1962, Pub. L. No. 87–423, § 1, 76 Stat. 46. Congress did not, however, address the matter of consecutive sentences in this amendatory legislation.

The parties in the present case are in agreement that Congress intended a person convicted of felony murder to be subject to the same penalty as a person convicted of premeditated murder, see, *e. g.,* 108 Cong. Rec. 4128–4129 (1962) (remarks of Sen. Hartke), and subject to more severe punishment than persons convicted of second-degree murder, see S. Rep. No. 373, 87th Cong., 1st Sess., 2 (1961); H. R. Rep. No. 677, 87th Cong., 1st Sess., 2 (1961). The parties disagree as to whether the consecutive sentences in this case are in accord with that congressional intent. The petitioner argues that if a consecutive sentence for rape were permitted, he would be punished more severely than if he had committed premeditated murder. The government counters that the relevant comparison is with the sentences permitted for premeditated murder plus rape, which can be consecutive. Likewise, the government argues that since consecutive sentences would be permissible for second-degree murder and rape, such sentences should be permitted here to avoid punishing felony murder and rape less harshly. In our view of this case, this controversy need not now be resolved.

[6] The Government would read D. C. Code § 23–112 to mean that courts may ignore the *Blockburger* rule and freely impose consecutive sentences "whether or not" the statutory offense are different under the rule. While this may be a permissible literal reading of the statute, it would lead to holding that the statute authorizes consecutive sentences for all greater and lesser included offenses—an extraordinary view that the Government itself disavows. Such an improbable construction of the statute would, moreover, be at odds with the evident congressional intention of requiring federal courts to adhere to the *Blockburger* rule in construing the penal provisions of the District of Columbia Code. See pp. 8–9, *infra.*

[7] There may be instances in which Congress has not intended cumulative punishments even for offenses that are different under the general provision contained in § 23–112. For example, in this case the District of Columbia Court of Appeals vacated the petitioner's sentence for second-degree murder, for the reason that, in the court's view, second-degree murder is a lesser included offense of first-degree-felony murder, notwithstanding the fact that each offense requires proof of an element that the other does not. The correctness of the Court of Appeals' ruling in this regard is not an issue in this case.

In this case resort to the *Blockburger* rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape. See *United States* v. *Greene*, — U. S. App. D. C. —, 489 F. 2d 1145, 1158 (1973). Cf. *Harris* v. *Oklahoma*, 433 U. S. 682, 682–683. The Government contends that felony murder and rape are not the "same" offense under *Blockburger*, since the former offense does not in all cases require proof of a rape; that is, D. C. Code § 22-2401 proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnapping *or* arson, etc. Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in the perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it.[8] To the extent that the government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity. See *Simpson* v. *United States*, 435 U. S. 6, 14–15; see also n. 10, *infra*.

Congress is clearly free to fashion exceptions to the rule it chose to enact in § 23–112. A court, just as clearly, is not. Accordingly, notwithstanding the arguments advanced by the Government in favor of imposing consecutive sentences for felony murder and for the underlying felony, we do not speculate about whether Congress, had it considered the matter, might have agreed.[9] It is sufficient for present purposes to observe that a congressional intention to change the general rule of § 23–112 for the circumstances here presented nowhere clearly appears. It would seriously offend the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment if this Court were to fashion a contrary rule with no more to go on than this case provides.[10]

For the foregoing reasons, the judgment of the District of Columbia Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

Because the District of Columbia Court of Appeals did not take account of § 23–112 of the District of Columbia Code, this is one of those exceptional cases in which the judgment of that court is not entitled to the usual deference. *Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974). This conclusion, in my opinion, need not rest on any constitutional considerations.

I agree for the reasons given by the Court that in light of § 23–112 and its legislative history, the court below erred in holding that Congress intended to authorize cumulative punishments in this case. But as I see it, the question is one of statutory construction and does not implicate the Double Jeopardy Clause. Had Congress authorized cumulative punishments, as the District of Columbia Court of Appeals held in this case, imposition of such sentences would not violate the Constitution. I agree with MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST in this respect.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court and much of its opinion. I write separately primarily to state my understanding of the effect, or what should be the effect, of the Court's holding on general double jeopardy principles.

(1) I agree with the Court that it would be inappropriate in this case to accord complete deference to the District of Columbia Court of Appeals' construction of the local legislation at issue. In addition to the reasons offered in the Court's opinion, *ante*, at 3–5, I would point out that the conclusions of the Court of Appeals concerning the intent of Congress in enacting the felony murder statute were unsupported by appropriate references to the legislative history. Moreover, that court ignored the effect of § 23–112 of the District of Columbia Code, which I have concluded is dispositive of this case. I view the case, therefore, as one falling within the class of "'exceptional situations where egregious error has been committed.'" *Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974), quoting from *Griffin* v. *United States*, 336 U. S. 704, 718 (1949), and *Fisher* v. *United States*, 328 U. S. 463, 476 (1946). Where such an error has been committed, this Court is barred neither by Art. III nor past practice from overruling the courts of the District of Columbia on a question of local law. *Pernell*, 416 U. S., at 365–369.

(2) I agree with the Court that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Ante*, at 3–4. I read the opinions cited by the Court in support of that proposition, however, as pronouncing a broader and more significant principle of double jeopardy law. The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more. "Where consecutive sentences are imposed at a single criminal trial, the role of the consti-

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[8] Contrary to the view of the dissenting opinion, we do not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment. *Post*, at 11–13. We have simply concluded that, for purposes of imposing cumulative sentences under D. C. Code § 23–112, Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape.

[9] See n. 5, *supra*.

[10] This view is consistent with the settled rule that "ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity," *United States* v. *Bass*, 404 U. S. 336, 347. See *Simpson* v. *United States*, 435 U. S. 6; *Rewis* v. *United States*, 401 U. S. 808; *Ladner* v. *United States*, 358 U. S. 169; *Bell* v. *United States*, 349 U. S. 81. As the Court said in the *Ladner* opinion: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U. S., at 178.

tutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio,* 432 U. S. 161, 165 (1977).[1]

Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single criminal transaction. See *Simpson* v. *United States,* 435 U. S. 6, 11–13 (1978); *Jeffers* v. *United States,* 432 U. S. 137, 155 (1977) (plurality opinion). I believe that the Court should take the opportunity presented by this case to repudiate those dicta squarely, and to hold clearly that the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. I must concede that the dicta that seemingly support a contrary view have caused confusion among state courts that have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments.[2]

(3) Finally, I agree with the Court that § 23–112 expresses Congress' intent not to authorize the imposition of consecutive sentences in cases in which the two offenses involved do not each require proof of a fact that the other does not. *Ante,* at 6–9. The question then remains whether the crimes of rape and felony murder based upon that rape each require proof of a fact that the other does not. I would agree that they do not, and for the reasons stated by the Court, *ante,* at 9–10. I hasten to observe, however, that this result turns on a determination of Congress' intent. The Court's holding today surely does not require that the same result automatically be reached in a State where the legislature enacts criminal sanctions clearly authorizing cumulative sentences for a defendant convicted on charges of felony murder and the underlying predicate felony. Nor does this Court's *per curiam* opinion in *Harris* v. *Oklahoma,* 433 U. S. 682 (1977), holding that *successive prosecutions* for felony murder and the underlying predicate felony are constitutionally impermissible, require the States to reach an analogous result in a multiple punishments case. Unfortunately, the rather obvious holding in *Harris* and the dictum in *Simpson* have combined to spawn disorder among state appellate courts reviewing challenges similar to the one presented here.[3] I would hope that today's holding will remedy, rather than exacerbate, the existing confusion.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Historians have traced the origins of our constitutional guarantee against double jeopardy back to the days of Demosthenes, who stated that "[T]he laws forbid the same man to be tried twice on the same issue. . . ." 1 Demosthenes 589 (Vince trans., 4th ed. 1970). Despite its roots in antiquity, however, this guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinions, including ones authored by me, are replete with *mea culpas* occasioned by shifts in assumptions and emphasis. Compare, *e. g., United States* v. *Jenkins,* 420 U. S. 358 (1975), with *United States* v. *Scott,* 437 U. S. 82 (1978) (overruling *Jenkins*). See also *Burks* v. *United States,* 437 U. S. 1, 9 (1978) (Our holdings on this subject "can hardly be characterized as models of consistency and clarity."). Although today's decision takes a tentative step toward recognizing what I believe to be the proper role for this Court in determining the permissibility of multiple punishments, it ultimately compounds the confusion that has plagued us in the double-jeopardy area.

I

In recent years we have stated in the manner of "black letter law" that the Double Jeopardy Clause serves three primary purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense. See *North Carolina* v. *Pearce,* 395 U. S. 711, 717 (1969); *Brown* v. *Ohio,* 432 U. S. 161, 165 (1977). See also *ante,* at 3 (opinion of the Court). Obviously, the scope of each of these three protections turns upon the meaning of the words "same offense," a phrase deceptively simple in appearance but virtually kaleidoscopic in application. Indeed, we have indicated on at least one prior occasion that the meaning of this phrase may vary from context to context, so that two charges considered the same offense so as to preclude prosecution on one charge after an acquittal or conviction on the other need not be considered the same offense so as to bar separate punishments for each charge at a single proceeding. See *Brown* v. *Ohio, supra,* at 166–167, n. 6.

In the present case we are asked to decide whether the Double Jeopardy Clause bars the imposition of separate punishments for the crimes of rape and felony murder based on rape. Because the sentences challenged by petitioner were imposed at a single criminal proceeding, this case obviously is not controlled by precedents developed in the context of successive prosecutions. Thus, the Court rightly eschews reliance upon *Harris* v. *Oklahoma,* 433 U. S. 682 (1977), where we concluded that the crimes of robbery and felony murder predicated on that robbery were similar enough to prevent the State of Oklahoma from prosecuting a person for the former offense after convicting him of the latter offense. See *ante,* at 9 (opinion of the Court). See also *ante,* at 3 (BLACKMUN, J., concurring in the judgment).

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[1] The Court in *Brown* cited the following decisions in support of its observations concerning the role of the Double Jeopardy Clause in multiple punishment cases: *Gore* v. *United States,* 357 U. S. 386 (1958); *Bell* v. *United States,* 349 U. S. 81 (1955); and *Ex parte Lange,* 18 Wall. 163 (1874). See also *Ashe* v. *Swenson,* 397 U. S. 436, 460, n. 14 (1970) (BRENNAN, J., concurring); M. Friedland, Double Jeopardy 205, 212 (1969); Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 112–113, 158–159; Note, Twice in Jeopardy, 75 Yale L. J. 262, 302–313 (1965).

[2] See *People* v. *Hughes,* 85 Mich. App. 674, 272 N. W. 2d 567 (1978); *id.,* at 683–687, 272 N. W. 2d, at 569–571 (Bronson, J., concurring); *id.,* at 687–696, 272 N. W. 2d, at 571–575 (Walsh, J., dissenting); *Ennis* v. *State,* 364 So. 2d 497 (Fla. App. 1978); *id.,* at 500 (Grimes, C. J., concurring); and *State* v. *Frye,* 283 Md. 709, 393 A. 2d 1372 (1978); *id.,* at 725–726, 393 A. 2d, at 1380–1381 (Murphy, C. J., concurring). In each of these state cases, the panels divided on the meaning of this Court's pronouncements respecting the Double Jeopardy Clause's prohibition against multiple punishments. See also cases cited in n. 3, *infra.*

[3] Compare *People* v. *Anderson,* 62 Mich. App. 475, 233 N. W. 2d 620 (1975) (a case in which a state court concluded, based on relevant indicia of legislative intent, that cumulative punishments for armed robbery and a felony murder based upon that robbery were not intended) with *State* v. *Pinder,* 375 So. 2d 836 (Fla. 1979); *State* v. *Frye,* 283 Md. 709, 393 A. 2d 1372 (1978); *State* v. *Innis,* — R. I. —, 391 A. 2d 1158 (1978), cert. granted, 440 U. S. 934 (1979). *Mitchell* v. *State,* — Ind. —, 382 N. E. 2d 932 (1978); *Briggs* v. *State,* 573 S. W. 2d 157 (Tenn. 1978) (the latter decisions, erroneously I believe, gave controlling effect to *Harris* in challenges to cumulative punishments for felony murder and the underlying felony).

Having determined that this case turns on the permissibility of "multiple punishments" imposed at a single criminal proceeding, the Court takes a tentative step in what I believe to be the right direction by indicating that the "dispositive question" here is whether Congress intended to authorize separate punishments for the two crimes. *Ante,* at 4 (opinion of the Court). As MR. JUSTICE BLACKMUN notes in his concurrence, this Court has not always been so forthright in recognizing that Congress could, if it so desired, authorize cumulative punishments for violation of two separate statutes, whether or not those statutes defined "separate offenses" in some abstract sense. See *ante,* at 2–3 (BLACKMUN, J., concurring in the judgment). While we have hinted at this proposition in prior opinions, see, *e. g., Brown* v. *Ohio, supra,* at 165; *Gore* v. *United States,* 357 U. S. 386, 394 (1958) (Warren, C. J., dissenting), we have just as often hedged our bets with veiled hints that a legislature might offend the Double Jeopardy Clause by authorizing too many separate punishments for any single "act." See, *e. g., Simpson* v. *United States,* 435 U. S. 6, 11–12 (1978); *Sanabria* v. *United States,* 437 U. S. 54, 69 (1978); *Jeffers* v. *United States,* 432 U. S 137, 155 (1977) (plurality opinion). To the extent that this latter thesis assumes that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses, "it demands more of the Double Jeopardy Clause than it is capable of supplying." Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 Supreme Court Review 81, 113. See also Note, Twice in Jeopardy, 75 Yale L. J. 262, 311–313 (1965).

Having come thus far with the Court and the concurrence, I here part company, for it seems clear to me that, if the only question confronting this Court is whether Congress intended to authorize cumulative punishments for rape and for felony murder based upon rape, this Court need decide no constitutional question whatsoever. Axiomatically, we are obligated to avoid constitutional rulings where a statutory ruling would suffice. See *Hagans* v. *Lavine,* 415 U. S. 528, 549 (1974); *Ashwander* v. *TVA,* 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Thus, to the extent that the trial court exceeded its legislative authorization in sentencing petitioner to consecutive sentences for rape and felony murder where Congress intended the offenses to merge, our holding should rest solely on our interpretation of the relevant statutes rather than on vague references to "the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment. . . ." *Ante,* at 10 (opinion of the Court).

Like many of the false trails we have followed in this area, the Court's confusion of statutory and constitutional inquiries is not without precedent. *Brown* v. *Ohio, supra,* contains dictum to the effect that, "[w]here consecutive sentences are imposed at a single criminal trial," the Double Jeopardy Clause prevents the sentencing court from "exceed[ing] its legislative authorization by imposing multiple punishments for the same offense." 423 U. S., at 165. In support of this dictum, which I believe ill-considered, *Brown* cited three cases: *Ex parte Lange,* 18 Wall. 163 (1874); *Bell* v. *United States,* 349 U. S. 81 (1955); and *Gore* v. *United States,* 357 U. S. 386 (1958). In doing so, it tied together three separate strands of cases in what may prove to be a true Gordian knot.

In *Ex parte Lange* petitioner had been convicted under a statute authorizing a punishment of either fine or imprisonment. The District Court nevertheless sentenced him to a fine *and* imprisonment. Petitioner had paid his fine and had begun to serve his sentence when the District Court, apparently recognizing its mistake, held a new sentencing proceeding and resentenced him to imprisonment only. Noting that petitioner had fully satisfied the relevant statute by paying the fine, this Court held that he was entitled to protection from a second punishment "in the same court, on the same facts, for the same statutory offence." 18 Wall., at 168. As is borne out by subsequent cases, the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a defendant's sentence for any particular statutory offense, even though the second sentence is within the limits set by the legislature. See *North Carolina* v. *Pearce,* 395 U. S. 711 (1969); *United States* v. *Benz,* 282 U. S. 304, 307 (1931). See also *United States* v. *Sacco,* 367 F. 2d 368 (CA2 1966); *United States* v. *Adams,* 362 F. 2d 210 (CA6 1966); *Kennedy* v. *United States,* 330 F. 2d 26 (CA9 1964).

In *Bell* v. *United States, supra,* this Court considered a question wholly different from that considered in *Ex parte Lange* and its progeny: the proper units into which a statutory offense was to be divided. The petitioner in *Bell* had been convicted of two counts of violating the Mann Act, 18 U. S. C. § 2421, for carrying two women across state lines for an immoral purpose. Both counts dealt with the same trip in the same car. The question presented to the Court was whether simultaneous transportation of more than one woman in violation of the Mann Act constituted multiple violations of that Act subjecting the offender to multiple punishments. The Court noted that Congress could, if it so desired, hinge the severity of the punishment on the number of women involved. Finding no evidence of such an intent, the Court applied the traditional "rule of lenity" and held that petitioner could only be punished for a single count.

Most significantly for our purposes, *Bell* was based entirely upon this Court's interpretation of the statute and the relevant legislative intent; it did not mention the Double Jeopardy Clause at all. In finding congressional intent on the appropriate unit of prosecution dispositive, the Court acted consistently with a long line of cases based in English common law. In *Crepps* v. *Durden,* 2 Cowper's Reports 640, 98 Eng. Rep. 1283 (K. B. 1777), Lord Mansfield, writing for a unanimous court, held that the sale of four loaves of bread on Sunday in violation of a statute forbidding such sale constituted one offense, not four. According to Lord Mansfield, "If the Act of Parliament gives authority to levy but one penalty, there is an end of the question. . . ." *Id.,* at 646, 98 Eng. Rep., at 1287. One hundred years later, this Court expressly adopted the reasoning of *Crepps* that the proper unit of prosecution was completely dependent upon the legislature's intent. See *In re Snow,* 120 U. S. 274, 283–286 (1887). We have consistently abided by this rule since that time, noting on at least one occasion that "[t]here is no constitutional issue presented" in such cases. See *Ladner* v. *United States,* 358 U. S. 169, 173 (1958). See also *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218 (1952); *Ebeling* v. *Morgan,* 237 U. S. 625 (1915). Cf. *Sanabria* v. *United States,* 437 U. S. 54, 69–70 (1978) (successive prosecutions).

Gore v. *United States, supra,* the third case cited in *Brown,* presented an issue analogous to, but slightly different from, that presented in *Bell* and the other unit-of-prosecution cases, namely, the permissibility of consecutive sentences when a defendant committed a single act that violated two or more criminal provisions. This issue, the precise one confronting us today, has been litigated in an astonishing number of statutory contexts with little apparent analytical consistency. See, *e. g., Simpson* v. *United States, supra; Harris* v. *United States,* 359 U. S. 19 (1959); *Heflin* v. *United States,* 358 U. S. 415 (1959); *Prince* v. *United States,* 352 U. S. 322 (1957); *Pereira* v. *United States,* 347 U. S. 1 (1954); *American Tobacco Co.* v. *United States,* 328 U. S. 781 (1946); *Holiday* v. *Johnston,* 313 U. S. 342 (1941); *Blockburger* v. *United States,* 284 U. S. 299 (1932); *Morgan* v. *Devine,* 237 U. S. 632 (1915); *Burton* v. *United States,* 202 U. S. 344 (1906); *Carter* v. *McClaughry,* 183 U. S. 365 (1902). In some of these cases the Court seems to have recognized that it was attempting to divine legislative intent. See, *e. g., Prince* v. *United States, supra,* at 328; *Morgan* v. *Devine, supra,* at 638–639; *Burton* v. *United States, supra,* at 377. In other cases, the Court seemed to apply a "same evidence" test borrowed from cases involving successive prosecutions.[1] See, *e. g., Pereira* v. *United States, supra,* at 9; *Carter* v. *McClaughry, supra,* at 394–395. In still others it is difficult to determine the precise basis for the Court's decision. See, *e. g., Harris* v. *United States, supra.* As in the unit-of-prosecution cases, this Court has specified on at least one occasion that the erroneous imposition of cumulative sentences in a single case raises no constitutional issue at all. See *Holiday* v. *Johnston, supra,* at 349.

Unlike the Court, I believe that the Double Jeopardy Clause should play no role whatsoever in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding. I would analogize the present case to our unit-of-prosecution decisions and ask only whether Congress intended to allow a court to impose consecutive sentences on a person in petitioner's position. To paraphrase Lord Mansfield's statement in *Crepps* v. *Durden, supra,* that should be the end of the question. As even the Court's analysis of the merits here makes clear, see *ante,* at 5–10 (opinion of the Court), traditional statutory interpretation as informed by the rule of lenity completely supplants any possible additional protection afforded petitioner by the Double Jeopardy Clause.

The difference in this context between a constitutional decision and a statutory decision is not merely one of judicial semantics. Both the Court and the concurrence appear to invoke the Double Jeopardy Clause to justify their refusal to defer to the District of Columbia Court of Appeals' interpretation of these locally applicable statutes. See *ante,* at 3–4 (opinion of the Court); *ante,* at 1 (BLACKMUN, J., concurring in the judgment). The mischief in this approach, I believe, is well illustrated in a footnote—fairly described as either cryptic or tautological—stating that "The Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Ante,* at 5, n. 4 (opinion of the Court). The effect of this and similar statements in the opinion of the Court, I fear, will be to raise doubts about questions of state law that heretofore had been thought to be exclusively the province of the highest courts of the individual States. To the extent that the Court implies that a state court can ever err in the interpretation of its own law and that such an error would create a federal question reviewable by this Court, I believe it clearly wrong.[2] For the question in such cases is not whether the lower court "misread" the relevant statutes or its own common law, but rather who does the reading in the first place.

II

Because the question before us is purely one of statutory interpretation, I believe that we should adhere to our "longstanding practice of not overruling the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed.'" *Pernell* v. *Southall Realty,* 416 U. S. 363, 369 (1974), quoting from *Griffin* v. *United States,* 336 U. S. 704, 718 (1949). In the present case I would suggest that the lower court, far from committing "egregious error," engaged in analysis much more sophisticated than that employed by the Court herein and reached a conclusion that is not only defensible, but quite probably correct.

The Court's attempt to determine whether Congress intended multiple punishment in a case like petitioner's is really quite cramped. It looks first to the legislative history surrounding the adoption of the relevant provisions and finds that history inconclusive. See *ante,* at 6, and n. 5 (opinion of the Court). It then attempts to mechanistically apply the rule of statutory construction employed by this Court in *Blockburger* v. *United States,* 284 U. S. 299 (1932). See *ante,* at 7–10 (opinion of the Court). Under that test, two statutory provisions are deemed to constitute the "same offense" so as to preclude imposition of multiple punishments unless "each provision requires proof of a fact which the other does not." 284 U. S., at 304. In *Blockburger,* for example, this Court determined that a provision forbidding the sale of certain drugs except in or from the original stamped package and a provision forbidding the selling of the same drugs "not in pursuance of a written order of the purchaser" defined separate offenses because "each of the offenses created requires proof of a different element." *Ibid.* Thus, separate penalties could be imposed under each statute, even though both offenses were based on the same sale.

Two observations about the *Blockburger* test are especially relevant in this case. First, the test is a rule of statutory construction, not a constitutional talisman.[3] See *Ianelli* v.

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[1] The "same evidence" test was first formulated in *Morey* v. *Commonwealth,* 108 Mass. 433, 434 (1871), where the Supreme Judicial Court of Massachusetts held:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence. A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or convicion under either statute does no exempt the defendant from prosecution and punishment under the other."

This Court has placed varying degrees of reliance upon this test both in the context of successive prosecutions, see, *e. g., Brown* v. *Ohio,* 432 U. S. 161 (1977); *Gavieres* v. *United States,* 220 U. S. 338, 342 (1911), and in the context of multiple punishments imposed at a single criminal proceeding. See, *e. g., Blockburger* v. *United States,* 284 U. S. 299 (1932); *Carter* v. *McClaughry,* 183 U. S. 365 (1902). See also *post,* at 9–15.

[2] We are not dealing here, of course, with a case where a state court has engaged in "retroactive lawmaking" by interpreting a local statute in an unforeseeable manner. Compare *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964), with *Rose* v. *Locke,* 423 U. S. 48 (1975).

[3] It should not matter whether the *Blockburger* test enters this case as a common canon of statutory construction, see *Ianelli* v. *United States,* 420 U. S. 770, 785, n. 17 (1975), or through the "less than felicitous" phrasing of D. C. Code § 23–112. See *ante,* at 7 (opinion of the Court). In either

United States, 420 U. S. 770, 785, n. 17 (1975). Having already posited that the Double Jeopardy Clause imposes no restraint upon a legislature's ability to provide for multiple punishments, I believe it clear that a legislature could, if it so desired, provide for separate punishments under two statutory provisions, even though those provisions define the "same offense" within the meaning of *Blockburger.* To take a simple example, a legislature might set the penalty for assault at two years imprisonment while setting the penalty for assault with a deadly weapon as "two years for assault and an additional two years for assault with a deadly weapon." Even though the former crime is obviously a lesser included offense of the latter crime—or, in the rubric of *Blockburger,* the first offense does not require proof of any fact that the second does not—neither *Blockburger* nor the Double Jeopardy Clause would preclude the imposition of the "cumulative" sentence of two years.[4]

Second, the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses. Strictly speaking, two crimes do not stand in the relationship of greater and lesser included offenses unless proof of the greater necessarily entails proof of the lesser. See *Brown* v. *Ohio, supra,* at 167–168. See also Black's Law Dictionary 1048 (rev. 4th ed. 1968). In the case of assault and assault with a deadly weapon, proof of the latter offense will always entail proof of the former offense, and this relationship holds true regardless whether one examines the offenses in the abstract or in the context of a particular criminal transaction.

On the other hand, two statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present. To cite one example, 18 U. S. C. § 924 (c)(1) states that "Whoever . . . uses a firearm to commit any felony for which he may be prosecuted in a court of the United States . . . shall . . . be sentenced to a term of imprisonment for not less than one year nor more than ten years." Clearly, any one of a plethora of felonies could serve as the predicate for a violation of § 924 (c)(1).

This multiplicity of predicates creates problems when one attempts to apply *Blockburger.* If one applies the test in the abstract by looking solely to the wording of § 924 (c)(1) and the *statutes defining* the various predicate felonies, *Blockburger* would always permit imposition of cumulative sentences, since no particular felony is ever "necessarily included" within a violation of § 924 (c)(1). If, on the other hand, one looks to the *facts alleged in a particular indictment* brought under § 924 (c)(1), then *Blockburger* would bar cumulative punishments for violating § 924 (c)(1) and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.

Fortunately, in the case of § 924 (c)(1) Congress made its intention explicit, stating unequivocally that the punishment for violation of that statute should be imposed "in addition to the punishment provided for the commission of [the predicate] felony. . . ." 18 U. S. C. § 924 (c). But in the present case, where the statutes at issue also stand in the relationship of compound and predicate offenses, Congress has not stated its intentions so explicitly. The felony-murder statute under consideration here provides:

> "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetration or in attempting to perpetrate any arson, . . . rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree." D. C. Code § 22–2401 (emphasis added).

The rape statute under consideration reads, in relevant part:

> "Whoever has carnal knowledge of a female forcibly and against her will . . . shall be imprisoned for any term of years or for life." D. C. Code § 22–2801.

If one tests the above-quoted statutes in the abstract, one can see that rape is not a lesser included offense of felony murder, because proof of the latter will not necessarily require proof of the former. One can commit felony murder without rape and one can rape without committing felony murder. If one chooses to apply *Blockburger* to the *indictment* in the present case, however, rape is a "lesser included offense" of felony murder because, *in this particular case,* the prosecution could not prove felony murder without proving the predicate rape.

Because this Court has never been forced to apply *Blockburger* in the context of compound and predicate offenses,[5] we have not had to decide whether *Blockburger* should be applied abstractly to the statutes in question or specifically to the indictment as framed in a particular case. Our past decisions seem to have assumed, however, that *Blockburger*'s analysis stands or falls on the wording of the statutes alone. Thus, in *Blockburger* itself the Court stated that "the applicable rule is that where the same act or transaction constitutes a violation of two distinct *statutory provisions,* the test to determine whether there are two offenses or only one, is whether each *provision* requires proof of a fact which the other does not." 284 U. S., at 304 (emphasis added). More recently, we framed the test as whether " 'each *statute* requires proof of an additional fact which the other does not. . . .' " *Brown* v. *Ohio, supra,* at 166, quoting *Morey* v. *Commonwealth,* 108 Mass. 433, 434 (1871) (emphasis added). See also *Ianelli* v. *United States, supra,* at 785, n. 17 ("[T]he Court's application of the [*Blockburger*] test focuses on the statutory elements of the offense."); M. Friedland, Double Jeopardy 212–213 (1969) (noting the two possible interpretations and pointing out that "the word 'provision' is specifically used in the test" as stated in *Blockburger*). Moreover, because the *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to

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case, the dispositive question is whether the legislature intended to allow multiple punishments, and the *Blockburger* test should be employed only to the extent that it advances that inquiry.

[4] In this regard, see also the discussion of the sentencing scheme under 18 U. S. C. § 924 (c)(1), *infra,* at 11.

[5] But see, *Simpson* v. *United States,* 435 U. S. 6, 11–12, and n. 6 (1978) (reserving application of *Blockburger* in context of 18 U. S. C. § 924 (c)); *Jeffers* v. *United States,* 432 U. S. 137, 149–150 (1977) (Blackmun, J.) (assuming, *arguendo,* that 18 U. S. C. § 846 is a lesser included offense of 18 U. S. C. § 848). But see also *American Tobacco Co.* v. *United States,* 328 U. S. 781, 788 (1946) (finding, under *Blockburger,* that conspiracies to violate §§ 1 and 2 of the Sherman Act could be punished separately).

the language as drafted by the legislature than to the wording of a particular indictment.

The Court notes this ambiguity but chooses instead to apply the test to the indictment in the present case.[6] See *ante*, at 9–10. In doing so, it offers only two reasons for rejecting what would seem to be the more plausable interpretation of *Blockburger*. First, the Court notes that Congress *could* have broken felony murder down in six separate statutory provisions, one for each of the predicate offenses specified in § 22-2401, thereby insuring that, under *Blockburger*, rape would be a lesser included offense of murder in the course of rape. According to the Court, "[i]t is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it." *Ante*, at 10 (opinion of the Court). The short answer to this argument is that Congress did *not* break felony murder down into six separate statutory provisions. Thus, it hardly avails the Court to apply *Blockburger* to a statute that Congress did not enact. More significantly, however, I believe that the Court's example illustrates one of my central points: when applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties. Cf. n. 6, *supra*. If the polestar in this case is to be legislative intent, I see no reason to apply *Blockburger* unless it advances that inquiry.

Second, the Court asserts that "to the extent that . . . the matter is not entirely free from doubt, the doubt must be resolved in favor of lenity." *Ante*, at 10. This assertion, I would suggest, forms the real foundation of the Court's decision. Finding no indication in the legislative history whether Congress intended cumulative punishment, and applying *Blockburger* with insolubly ambiguous results, the Court simply resolves its doubts in favor of petitioner and concludes that the rape committed by petitioner must merge into his conviction for felony murder. In doing so, the Court neglects the one source that should have been the starting point for its entire analysis: the lower court's construction of the relevant statutes.

Unlike this Court, the District of Columbia Court of Appeals looked beyond the ambiguous legislative history and the inconclusive *Blockburger* test to examine the common-law roots of the crime of felony murder and to consider the societal interests protected by the relevant statutes. As for the first source, the lower court concluded from the history of felony murder at common law that "while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism" and that merger of the two offenses was therefore "inappropriate." *Whalen* v. *United States*, 379 A. 2d 1152, 1160 (DC 1977). In so reasoning, the lower court acted in conformity with this Court's long tradition of reading criminal statutes enacted by Congress "in the light of the common law. . . ." *United States* v. *Carll*, 105 U. S. 611, 612 (1882). See also *Morissette* v. *United States*, 342 U. S. 246, 262–263 (1952).

In addition to looking to the common law for assistance in determining Congress' intent, the lower court examined "the societal interests protected by the statutes under consideration." 379 A. 2d, at 1158–1159. Because § 22-2801 was designed "to protect women from sexual assault" while § 22-2401 was intended "to protect human life," the court concluded that cumulative punishment was permissible. *Id.*, at 1159. Indeed, the *Blockburger* test itself could be viewed as nothing but a rough proxy for such analysis, since, by asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.

III

In sum, I find the lower court's reliance upon articulated considerations much more persuasive than this Court's capitulation to supposedly hopeless ambiguity. But even if the case were closer, I do not see how the lower court's conclusion could be classified as "egregious error" so as to justify our superimposing our own admittedly dubious construction of the statutes in question on the District of Columbia. Unless we are going to forgo deference to the interpretation of the highest court of the District of Columbia on matters of local applicability and are going to push several other well-recognized principles of statutory and constitutional construction out of shape, with consequences for the federal system for the 50 States, I would hope that the Court's decision would be one ultimately based on the "rule of lenity." Because I believe that the question confronting us is purely one of statutory construction and because I believe the analysis indulged in by the Court of Appeals for the District of Columbia comes far closer to the proper ascertainment of congressional intent than does this Court's opinion, I would affirm the judgment of the District of Columbia Court of Appeals.

SILAS J. WASSERSTROM, Public Defender, Washington, D.C. (WILLIAM J. MERTENS, and W. GARRY KOHLMAN, with him on the brief) for petitioner; ANDREW L. FREY, Deputy Solicitor General (WADE H. McCREE, JR., Solicitor General, PHILIP B. HEYMANN, Assistant Attorney General, ALLAN A. RYAN, JR., Assistant to the Solicitor General, JEROME M. FEIT, and ELLIOTT SCHULDER, Justice Department attorneys, with him on the brief) for respondent.

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[6] The Court denies that it applies the *Blockburger* test to the indictment in this case, asserting instead that it merely concludes that "rape is to be considered a lesser offense included within the offense of a killing in the course of rape." *Ante*, at 10, n. 8. Our disagreement on this matter turns on the elusive meaning of the word "offense." Technically, § 22-2401 defines only one offense, murder in the first degree, which can be committed in any number of ways. Even if the inquiry is limited to the "sub-offense" of felony murder, § 22-2401 indicates that a person may be convicted if he kills purposely in the course of committing any felony or kills even accidentally in the course of committing one of six specified felonies. Only by limiting the inquiry to a killing committed in the course of a rape, a feat that cannot be accomplished without reference to the facts alleged in this particular case, can the Court conclude that the predicate offense is necessarily included in the compound offense under *Blockburger*. Because this Court has never before had to apply the *Blockburger* test to compound and predicate offenses, see n. 5, *supra*, and accompanying text, there is simply no precedent for parsing a single statutory provision in this fashion.

No. 79-260

Cecil D. Andrus, Secretary of Interior, Petitioner,
v.
State of Idaho et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 16, 1980]

Syllabus

The Carey Act of 1894 (Act), in order to aid covered States in the reclamation of desert lands, "authorizes and empowers" the Secretary of the Interior (Secretary), with the President's approval, upon proper application by a State to donate, grant, and patent such desert lands, not exceeding a specified acreage, as the State should cause to be irrigated, reclaimed, and occupied, provided however, that the lands may be restored to the public domain if the requirements as to reclamation are not satisfied within stated time limits. Under 43 U. S. C. § 643, the Secretary was also authorized, upon request of a State, to withdraw desert lands temporarily from the public domain prior to the State's submission of a formal plan under the Carey Act. Acting pursuant to 43 U. S. C. § 643, Idaho requested that a certain tract of land be temporarily withdrawn from the public domain pending the submission of a proposed development plan under the Act. The Idaho Office of the Bureau of Land Management rejected the application in part because some of the lands requested had already been withdrawn for other purposes, including a portion being used as a stock driveway. Idaho appealed to the Interior Board of Land Appeals (Board) with respect to the lands previously withdrawn for stock-driveway purposes, and also petitioned the Board for reclassification of the stock-driveway lands as suitable for use under the Act. Ultimately, the Board affirmed the rejection of Idaho's Carey Act application and returned the case to the Bureau of Land Management for initial action on the petition for reclassification of the stock-driveway lands and for further action on the remaining lands covered by the application for temporary withdrawal. Meanwhile, Idaho filed suit in Federal District Court for a declaration of its rights under the Act. That court held that the State was entitled to up to 2.4 million acres of desert land for which the Secretary was obligated to contract with the State pursuant to the terms of the Act; that the Act, however, was not a grant *in praesenti*, and the State did not have an absolute right to the particular desert lands that it happened to select; and that if the lands had been withdrawn for another public use pursuant to another statute, the State's remedy was to request reclassification, which the Secretary could not arbitrarily deny. The Court of Appeals affirmed.

Held:

1. There is a real case or controversy with respect to the issue presented in the United States' petition for certiorari as to whether, under the Act, the State was entitled to 2.4 million acres of desert land which the Secretary then must reserve from appropriation to other public or private uses, and not just as to the State's entitlement to the lands that had been withdrawn for stock-driveway purposes and that were involved in its Interior Department appeal. Throughout the administrative and judicial proceedings, the parties have taken contrary positions as to whether the State is absolutely entitled to select and have withdrawn under the Act up to 2.4 million acres of desert land regardless of whether the lands it designates have already been withdrawn for other purposes, provided only that statutory preconditions are satisfied.

2. It is apparent from the language and legislative history of the Act that Congress did not intend to reserve any specific number of acres of desert land for any State under the Act, and the Act does not prevent the Secretary from committing otherwise available parts of the public domain for any of the uses authorized under the various statutes relating to the use and management of the public lands. The Act does not oblige the Secretary automatically to contract for lands chosen by the State even if its application otherwise conforms to the statute. Hence, even though a State's selection has not been withdrawn for other uses, the Secretary need not always approve the application.

595 F. 2d 524, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Carey Act of 1894, ch. 301, § 4, 28 Stat. 422, 43 U. S. C. § 641 (Act), "to aid public-land States" in the reclamation of desert lands, authorizes the Secretary of the Interior (Secretary) upon proper application "to contract and agree, from time to time . . . binding the United States to donate, grant, and patent" such desert lands, not exceeding a specified acreage, as the State should cause to be irrigated, reclaimed, and occupied, provided, however, that the lands would be restored to the public domain if reclamation had not begun and plans carried out within stated time limits. Originally, each State covered by the Act was limited to 1 million acres; but in 1908, the ceiling for Idaho was raised to 3 million acres. Also, in 1910, upon request of a State, the Secretary was authorized to withdraw desert lands temporarily from the public domain prior to the State's submission of a formal plan under the Carey Act. 36 Stat. 237, 43 U. S. C. § 643.[1]

Of all Carey Act patents issued, a large majority were issued early in the century, the scarcity of water for irrigation being primarily responsible for the absence of patents in the past 30 years. Improved technology for pumping from deep water sources, however, among other things, has revived interest in reclaiming arid lands.

In 1974, the State of Idaho, acting pursuant to 43 U. S. C. § 643, requested that an identified tract of some 27,400 acres be temporarily withdrawn from the public domain pending the submission of a proposed development plan as required by the Carey Act. In January 1975, the Idaho State Office, Bureau of Land Management, rejected the application in part because some of the lands requested had already been withdrawn for other purposes, including a portion being used as stock-driveway. Idaho appealed to the Interior Board of Land Appeals (Board) with respect to the lands previously withdrawn for stock-driveway purposes.[2] Idaho also filed with the Board a petition under § 7 of the Taylor Grazing Act, 48 Stat. 1272, as amended 49 Stat. 1976, 43 U. S. C. § 315f, for reclassification of the stock-driveway lands as suitable for use under the Carey Act.

The Board, in its decision issued on July 31, 1975, found that the applicable regulations prevented it from withholding action on the Carey Act application pending a decision on the Taylor Act reclassification petition.[3] The Board then rejected Idaho's assertion that its Carey Act application took precedence over any withdrawal subsequent to the date of the Act because the Act was a grant *in praesenti* or because the grant, when the specified conditions were fulfilled, related back to the date of the Act. The Board adhered to its prior decision in *State of Wyoming*, 36 L. D. 399, 399 (1908), which held that under the Carey Act "the acceptance of the offer of the State is a matter wholly within the discretion of the Department." That being so, the State had no rights whatsoever to have *any* application approved. The Board further repeated *Wyoming*'s statement that if lands had been withdrawn for other purposes, the presumption that the withdrawal was proper is "conclusive," the lands were not available for a claim under the Carey Act, and the State was not entitled to a hearing "for the purpose of determining whether or not [the Secretary's] discretion has been properly exercised." *Id.*, at 400. The Board, therefore, affirmed the rejection of Idaho's Carey Act application. The case was returned to the Bureau of Land Management for initial action on the petition for reclassification of the stock-driveway lands and for further action on the remaining lands covered by the application for temporary withdrawal.

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[1] This legislation was prompted by a desire to prevent speculative filings under entry statutes on land chosen by a State for a Carey Act project. S. Rep. No. 367, 61st Cong., 2d Sess. (1910); H. R. Rep. No. 662, 61st Cong., 2d Sess. (1910). After the decision and judgment of the District Court in this case, this provision was repealed by § 704 (a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2792. Under § 204 of FLPMA, 43 U. S. C. § 1714, however, which gives the Secretary the general authority to make withdrawals, the Secretary construes his authority to allow him to withdraw public lands from entry pending submission of a formal plan under the Carey Act.

[2] On the State's failure to appeal the denial with respect to the lands covered by the application that had been withdrawn for purposes other than stock-driveway, the order as to these lands became final.

[3] The Board cited its stock-driveway regulations providing that "[l]ands withdrawn for driveways for stock . . . are not subject to entry or disposition" and that applications for the acquisition of such lands shall be rejected. 43 CFR § 2313.1 (c) (1974). The Board also relied on a general regulation, 43 CFR § 2091.1 (a) (1974), providing in pertinent part that "applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by . . . [w]ithdrawal or reservation of lands." The Board's prior cases are also to this effect.

Meanwhile, in February 1975, the State of Idaho, through its appropriate officials, filed a complaint in the United States District Court for the District of Idaho against the Secretary of the Interior. The State alleged that by virtue of the Carey Act, the United States "has bound itself to donate, grant and patent to the State of Idaho . . . three million acres of desert lands," that "these lands are subject to temporary withdrawal and/or segregation upon [the State's] request," that the Secretary is "without any discretion to deny desert lands once requested," and that the Secretary now asserts that "he will not allow the requests for segregation or withdrawal under the Carey Act as a matter of right." The State prayed for a declaration of its rights under the Carey Act.[4] The Secretary's answer admitted that he would not allow requests for segregation or withdrawal as a matter of right but denied the remainder of the foregoing allegations.

On cross motions for summary judgment, Idaho submitted that the Carey Act had been an immediately effective grant, or at least that the United States was firmly obligated to contract with and patent the statutory acreage to Idaho when and if Idaho satisfied the statutory preconditions. In the State's view, Carey Act applications took precedence over prior withdrawals. The Secretary, therefore, had been wrong to deny Idaho's request for temporary withdrawal, even though the specified lands had already been withdrawn for other purposes. The United States, to the contrary, asserted that the Carey Act granted nothing to Idaho, had not obligated the Secretary to contract with Idaho with respect to any desert lands selected by the State, but had merely authorized the Secretary to contract if he, in his unbridled discretion, saw fit to do so. The Secretary, therefore, had committed no error and had not exceeded his authority under the Carey Act or any other law when he denied the petition for temporary withdrawal.

The District Court, in its memorandum opinion and decision of July 15, 1976, rejected the State's claim that the Carey Act was an *in praesenti* grant giving the State an absolute right to the acreage specified in the Act. The District Court went on to hold, however, (1) that Idaho was "guaranteed a maximum entitlement of three million acres of suitable desert land . . . which it cannot be deprived of by the Secretary of the Interior, if the State meets the conditions of the Carey Act"; (2) that "[t]he Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right to entitlement, which the Federal Government must contract to donate to the State in accordance with the Act"; and (3) that "[t]o the extent the land has been withdrawn for other purposes" and the State desires the land for Carey Act development, "its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry," in which event "[t]he Secretary may not arbitrarily deny the State's application for reclassification," his ruling thereon being subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 706. 417 F. Supp. 873, 881 (Idaho 1976). The District Court went on to indicate its affirmance of the Interior Board of Land Appeals' decision and to this extent granted the Secretary's motion for summary judgment.

The Secretary moved for reconsideration and modification of the decision. The District Court again heard oral argument. After first suggesting that the District Court had erred in construing the Carey Act instead of merely sustaining the administrative action, the Secretary then agreed that the case had proceeded as a declaratory judgment action, or at least that it had a declaratory judgment dimension. The Secretary again presented his position that the Carey Act placed no obligation whatsoever on him to enter into any contract with Idaho or to approve any Carey Act application filed by the State.

In this respect, the judge expressed his disagreement and on August 26, 1976, entered his judgment, which, as amended in minor respects on November 15, (1) rejected the State's prayer for declaration of its absolute right to demand three million acres of the public domain without regard to any previous classifications and withdrawals and affirmed the decision of the Interior Board of Land Appeals; (2) declared that Idaho is "entitled to have withdrawn and patented three million acres of desert lands in the public domain," provided that there are sufficient desert lands within the State of Idaho and provided that Idaho satisfies all the terms and conditions of the Act, and declared that by the Carey Act the United States had "bound itself to contract, donate, grant and patent to the State of Idaho, upon compliance with the stated conditions, . . . not to exceed three million acres [of desert land] as that sum may be reduced by prior patents issued pursuant to the Carey Act"; and (3) declared that with respect to desert lands presently withdrawn from the public domain for other purposes, the State's remedy, should it desire to initiate Carey Act development on such lands, "is to petition the [Secretary] for temporary withdrawal under 43 U. S. C. Sec. 643 and/or under 43 U. S. C. Sec. 315f, and it is the duty of the [Secretary] to entertain and act upon said petition or petitions in accordance with the public land laws of the United States of America and in accordance with due and proper administrative procedures."

The Ninth Circuit affirmed the judgment "[u]pon the basis of the carefully written opinion" of the District Judge. 595 F. 2d 524 (1979). We granted the petition for writ of certiorari filed by the United States and presenting the single question whether the Carey Act "requires the Secretary of the Interior indefinitely to reserve from appropriation to other public or private uses some 2.4 million acres of desert land within Idaho for the eventuality that the State may be able and willing to select all or any part of such acreage for irrigation and reclamation under the Act." — U. S. — (1979).

I

There is first the question raised at the oral argument of this cause whether there is a case or controversy between the State and the Secretary as to anything other than the State's entitlement to the lands that had been withdrawn for stock-driveway purposes and that were involved in its Interior Department appeal; or, to put the matter another way, whether there is a real case or controversy with respect to the issue that the United States presented in its petition for certiorari, namely, whether the State was entitled to 2.4 million acres of desert land which the Secretary then must preserve for Carey Act development. Although the United States urged on appeal in the Court of Appeals that there was no case or controversy whatsoever, even as to any of the lands covered by Idaho's Carey Act application for temporary withdrawal,[5] the Court of Appeals apparently rejected the argument; the United States raised no jurisdictional question in its petition or its brief; and the Solicitor General at oral argument was of the opinion that the District Court and the Court of Appeals had jurisdiction to enter the judgments that appear in this record. We have the same view.

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[4] The State alleged jurisdiction in the District Court "by virtue of a federal question existing and amounts of money involved . . . in excess of $10,000, exclusive of costs and interest." The State also alleged jurisdiction "pursuant to the Federal A. P. A. (5 USC 701 et seq)." The complaint did not recite that the State sought relief pursuant to the Declaratory Judgment Act, 28 U. S. C. § 2201, but the District Court understood the complaint as seeking declaratory relief.

From the very outset, the State took the position that it is absolutely entitled to select and have withdrawn under the Carey Act up to 2.4 million acres of desert land, provided only that it satisfy the statutory preconditions. Whether or not the lands that it designated had already been withdrawn for other purposes, such as a stock driveway, it was the State's view that the Secretary had no discretion to deny withdrawal of desert lands that the State selected. The Secretary, on the other hand, from the outset, denied that the State had any right to contract for desert lands under the Carey Act and asserted that it was within his discretion to deny any and all state requests for withdrawal or segregation of lands of the Carey Act, whether or not the selected lands were already in use for other purposes. These were the respective positions of the parties in the Interior Department proceedings, with the Interior Board of Land Appeals rejecting the State's and adopting the Secretary's position.

These were also the positions of the parties in the District Court. The State and the Secretary were thus at odds over the proper construction of the Carey Act, over the State's entitlement under the statute, and over the extent of the Secretary's discretion. If the State was correct as to the meaning of the Act, the denial of its request for withdrawal of the stock-driveway lands was incorrect; but the denial was correct if the Secretary had the better view of the statute. We thus find it undeniable that there was a case or controversy between the Secretary and the State with respect to the approval of its Carey Act application and that the case or controversy in this respect turned on what rights, if any, the State had under this 1894 statute. Although at the time that the case was filed in the District Court, the State's administrative appeal had not yet been decided, a case or controversy in the Art. III sense existed; and, in any event, administrative appellate procedures were soon exhausted. The District Court accepted the case as involving a review of the Secretary's action and as requiring a declaration of the respective rights of the State and the Secretary under the Act.

In proceeding to address the statutory issues tendered by the State, the District Court rejected both the position of the State and that of the Secretary. The State was entitled to up to 2.4 million acres of desert land for which the Secretary was obligated to contract with the State pursuant to the terms of the Act; but the Act was not a grant *in praesenti,* and the State did not have an absolute right to the particular desert lands that it happened to select. If the lands had been withdrawn for another public use pursuant to another statute, the State's remedy was to request reclassification, which the Secretary could not arbitrarily deny. Under this approach, the Secretary was correct in denying the State's request for immediate withdrawal of the lands already in use as a stock driveway; but the Secretary was quite wrong in claiming absolute discretion to deny any Carey Act application, including the State's pending application insofar as it covered lands that had *not* yet been withdrawn for other purposes.

These elements were included in the District Court's judgment and were supported by its opinion. We find no jurisdictional barrier to the entry of such a judgment or to appellate review of that part of the judgment to which the United States objects as a misconstruction of the Carey Act and as an unwarranted extension of rights to the State that would constitute a substantial interference with the authority of the Secretary to manage the public lands.

II

As was set out above, the judgment declared that Idaho is "entitled" to 2.4 million acres of Carey Act land and that the Secretary is "bound" to contract for such lands. Although the judgment did not prevent the Secretary from putting desert lands to other uses, the judgment, fairly read, would obligate the Secretary to contract with the States for lands selected by it that had not been so withdrawn, if the State complied with the statutory conditions.[6] The Secretary submits that the Act does not so drastically limit his discretion. He also understands these same provisions of the judgment to mean that he "must hold for eventual disposition under the Carey Act approximately 2.4 million acres of unappropriated desert lands." Brief for Petitioner 8. At least that much desert land, he says, must be reserved and may not be put to other uses. Although the judgment does not so provide in so many words, it is fairly arguable that this is what the trial court intended, particularly because in its opinion, which the Court of Appeals made its own, the trial court held that the State is "guaranteed" the statutory acreage, "which it cannot be deprived of by the Secretary," and that the Secretary is under an "obligation to preserve enough desert land suitable for Carey Act development" to fulfill the State's entitlement. The precise meaning of the judgment in this respect, however, we do not further pursue; for as we understand the language and legislative history of the Carey Act, it neither requires the Secretary to hold the statutory acreage in reserve nor obliges him always to contract with the State for desert lands that the State selects from those parts of the public domain that have not been withdrawn for other purposes.

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[5] In the Court of Appeals, the Secretary conceded that a case or controversy had existed with respect to the stock-driveway lands for which temporary withdrawal had been requested under § 643 but asserted that the controversy had become moot with the repeal of § 643. The Secretary now concedes, however, that under the Federal Land Policy and Management Act of 1976, even though it repealed § 643, he has the same power of temporary withdrawal as he had under § 643. See n. 1, *supra.*

[6] The State has not cross-petitioned from the holding that the Carey Act is not a grant *in praesenti* and that a Carey Act application does not automatically take precedence over prior withdrawals. The State as respondent is not entitled absent a cross-petition to bring that issue before us; for a favorable ruling would enlarge the relief granted the State under the Court of Appeals judgment. The State does of course, strongly urge, as it may, that it is entitled to at least what the District Court recognized to be its rights under the Carey Act.

The language of the Act[7] "authorizes and empowers," but does not direct, the Secretary to contract with the State upon the State's proper application. This is permissive language, as compared with the obligatory statutory language requiring the Secretary to issue a patent once he has contracted with the State and the State has satisfied the contractual and statutory conditions. Furthermore, the Secretary may act only with the approval of the President, a provision which strongly suggests that the statutory discretion to contract is broader than merely determining whether the application on its face satisfies the statutory requirements.[8]

In ascertaining the meaning of the relevant language of the Act, it is important to note the circumstances of its adoption in 1894. The initial version of the Act was adopted in the Senate as an amendment to an appropriations bill that had already passed the House. The amendment, which was offered by Senator Carey of Wyoming, was in the form of a Senate bill that had previously been offered by the Senator and passed by the Senate but was still pending before a House committee. This bill, and the amendment to the appropriations bill, provided that each State could select up to the specified acreage of desert lands and that upon selection the lands would be immediately reserved from other entry and would be patented to the State upon proof that the selected land had been suitably reclaimed. The House conferees brought the amended appropriations bill before the House where a substitute for the Senate amendment was offered by Representative McRae and was adopted after full debate. The conference committee then adopted the House substitute, and it was this version that became known as the Carey Act.

For present purposes, the principal difference between the Senate amendment and the McRae substitute was that the former provided for automatic reservation upon selection by the State and the latter did not. As Representative McRae explained, 26 Cong. Rec. 8391 (1894): "The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period. . . . The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated. . . ." And again, *id.*, at 8431: "This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed." There are some indications during the debates, originating from both proponents and opponents of the provision, that perhaps a more substantive action was intended; but there is nothing that undercuts the explanation of Representative McRae as to the meaning of the markedly different language contained in the House substitute. Nor is there anything persuasive in the several later additions or amendments to the Carey Act indicating that the Act reserved to the State or obligated the Secretary to contract for any particular acreage for Carey Act development.[9]

It has also been the consistent view of the Department of the Interior that the Carey Act does not grant or reserve any specified acreage of desert lands for development under the Carey Act. *State of Wyoming*, 36 L. D. 399 (1908), relied on by the Secretary in this case, stands for at least this much; and we have in other cases accorded a considerable deference to the responsible Agency's construction of the statute which it administers. *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 613–614 (1978); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *Cameron* v. *United States*, 252 U. S. 450, 460 (1920). It is also ascertainable from the *Congressional Record*, reflecting the proceedings connected with the 1908 amendments to the Carey Act, that the eight States covered by the Act had by that time selected approximately 2.72 million acres under the Carey Act but that less than half that amount, 1.12 million acres, had been approved and only 200,000 acres had gone to patent. One of the many reasons for rejections of selected lands had been that they were already in other legitimate use or that such use was being considered. 42 Cong. Rec. 6437 (1908).[10]

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[7] The Carey Act, 43 U. S. C. § 641, provides in pertinent part:

"To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President . . . is authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands . . . binding the United States to donate, grant, and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and . . . cultivated by actual settlers . . . within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands. . . ."

Section 641 further provides that if the requirements as to reclamation are not satisfied within certain time periods, the Secretary may restore the lands to the public domain or may authorize limited extension of the deadlines.

[8] The District Court purported to find some support for its conclusion in *Idaho Irrigation Co.* v. *Gooding*, 265 U. S. 518, 521 (1924), where the Court recited that the Carey Act "binds" the United States to donate desert lands to the States. The passage referred to, however, does not say that the United States is bound to contract in the first instance. In any event, that case involved a dispute between an irrigation company and the owners of water rights pursuant to contracts with the company; and it was only in describing the background of the case that the Court referred to the Carey Act. There was no question in that case as to the scope of the State's entitlement under the Act or the scope of the Secretary's discretion. Attaching great significance to this recitation is unwarranted. Nor do we find the other state and federal cases that the District Court cited to be persuasive support for its conclusions as to the Secretary's obligations.

[9] In 1896, Congress provided that patents could be issued when water had been supplied to the land without regard to settlement or cultivation. The same Act provided for liens against the lands prior to patent for the costs of reclamation. Act of June 11, 1896, ch. 421, § 1, 29 Stat. 434, 43 U. S. C. § 642. Although § 642 refers to the "grant" made under § 641, the context indicates that the word is loosely used to refer to the state laws enacted in acceptance of the terms of the Carey Act. Idaho, in fact, stresses that it, like 9 of the 11 other desert land States, specifically referred to the Carey Act's "grants of land" when the State enacted legislative acceptances of the offer to obtain federal lands by reclamation. Brief for Respondent 12–13, and n. 6.

Subsequent legislation did not touch on the issue at all. In 1908, an additional two million acres of desert lands were authorized for Carey Act selection in the State of Idaho, 43 U. S. C. § 645 and Joint Res. No. 28, 60th Cong., 1st Sess. (1908), see 35 Stat. 577; and an additional 1 million acres in the State of Wyoming. 43 U. S. C. § 645. In 1909, the provisions of the Carey Act were extended to the States of Arizona and New Mexico, § 646, and to the former Ute Indian Reservation in Colorado. § 647. In 1910, as indicated in the text, § 643 with respect to temporary withdrawals was adopted. In 1911, the Act was extended to the Ft. Bridger Military Reservation in Wyoming, Act of Feb. 16, 1911, ch. 900, 36 Stat. 913; and an additional 1 million acres were authorized for the States of Nevada and Colorado. 43 U. S. C. § 645. The Act was amended in 1920 with respect to rights of entry by settlers on lands covered by unsuccessful Carey Act projects. § 644. In 1921, the Secretary of the Interior was authorized to extend the period of segregation or to restore the lands to the public domain when States failed to construct the anticipated reclamation works. § 641. Congress at no time indicated disagreement with the way that the Secretary was administering the Carey Act, at least as relevant to the issues in this case.

Against this background, we conclude that Congress did not intend to reserve any specific number of acres of desert land for any State under the Carey Act and that the Act does not prevent the Secretary from committing otherwise available parts of the public domain for any of the uses authorized under the various statutes relating to the use and management of the public lands, such as the Taylor Grazing Act under which part of the lands that Idaho sought in this case have been withdrawn. It is also clear that one of the reasons prompting the McRae substitute was to eliminate the right of the State under the Senate version to have automatically reserved and to contract for the particular lands that it selected. As finally adopted, the Act does not oblige the Secretary automatically to contract for lands chosen by the State even if its application otherwise conforms to the statute. Hence, even though a State's selection has not been withdrawn for other uses, as is the case with part of the land that Idaho applied for in this case,[11] the Secretary need not always approve the application.[12]

The District Court was therefore correct in remitting the State to a reclassification proceeding with respect to the land in use as a stock driveway; but the District Court erred in declaring that the Act entitled the State to the statutory acreage in the sense that the Secretary was firmly bound to reserve such acreage and to contract for it as and when the State selected it.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed in part and reversed in part.

So ordered.

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[10] During the discussion, Representative Gaines of Tennessee asked Representative French of Idaho to explain why the Secretary had not granted all Carey Act applications. Representative French replied:

"The reason is this: We have a national reclamation law under which lands are being reclaimed; we have the Indian reservation law; we have lands that have passed into private ownership under the desert-land act and other laws. Sometimes it happens that an application for segregation under the Carey Act overlaps one or more of these propositions or tracts of land."

[11] Prior to the District Court's judgment, the Board also ruled on two other Carey Act applications by Idaho covering unwithdrawn and otherwise available land. Idaho Department of Natural Resources, 25 I. B. L. A. 27 (May 5, 1976); Idaho Department of Natutral Resources, 24 I. B. L. A. 314 (April 3, 1976).

[12] The Secretary has not questioned the judgment and opinion of the District Court indicating that the Secretary's refusal to reclassify withdrawn lands for Carey Act purposes would be subject to judicial review and would be set aside if arbitrary or capricious. Neither has the Secretary asserted that his rejection of a State's application for withdrawal or segregation of appropriate desert lands in the public domain would not be subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 706. To the extent that the claim of absolute discretion to approve or disapprove Carey Act applications is inconsistent with the absence of a direct challenge to this aspect of the District Court's decision or with the general standards for judicial review of agency action under the Administrative Procedure Act, we reject, as did the District Court, the claim of absolute discretion.

MR. JUSTICE STEVENS, dissenting.

Everyone agrees that the District Court correctly rejected Idaho's now-abandoned claim that the Carey Act, as amended, constituted an absolute, present grant of entitlement to any three million acres of arid lands that the State might designate at some time in the future. But the District Court's rejection of that claim did not require it to express any opinion on any of the questions that the Court discusses today.

This record does not present the question of what reasons, if any, are necessary or sufficient to justify a denial by the Secretary of a Carey Act application or a petition for reclassification under the Taylor Grazing Act.[1] I would therefore express no opinion on that question.

Nor is there anything in this record to suggest that there is any imminent likelihood that the Secretary will reserve for other purposes so much of the federal land in Idaho otherwise suitable for Carey Act contracts that less than 2,400,000 acres will be available.[2] Unless and until such a likelihood appears, there is no need to decide whether he may do so. The fact that in the 85-year life of the Carey Act Idaho has used only about one-fifth of the 3,000,000 acres authorized makes it rather clear that resolution of that issue is of no immediate consequence to either party.

In short, I do not believe either of the questions on which the Court has volunteered its advice is ripe for decision. I would simply vacate the purely advisory portions of the District Court's judgment and refrain from deciding any questions not fairly raised by this record.

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[1] Idaho's complaint prayed simply for a declaration that "the State of Idaho has an absolute right to demand up to three million acres of desert lands under the Carey Act and further . . . that the [Secretary of Interior] . . . has no authority or discretion to deny any request for segregation or withdrawal when presented by the Plaintiff." App. 6.

[2] It was suggested by the State at oral argument that perhaps as much as 8,500,000 acres is "susceptible of possible irrigation that is still in Federal hands." Tr. of Oral Arg. 33. To date, Idaho has received approximately 600,000 acres under the Carey Act.

STUART A. SMITH, Assistant to the Solicitor General (**WADE H. McCREE, JR.**, Solicitor General, **JAMES W. MOORMAN**, Assistant Attorney General, **LOUIS F. CLAIBORNE**, Deputy Solicitor General, **WILLIAM ALSUP**, Assistant to the Solicitor General, **JACQUES B. GELIN** and **EDWARD J. SHAWAKER**, Justice Department attorneys, with him on the brief) for petitioner; **DAVID H. LEROY**, Attorney General, State of Idaho (**W. HUGH O'RIORDAN** and **JOSEPHINE P. BEEMAN**, Deputy Attorneys General, with him on the brief) for respondents.

The United States
LAW WEEK

§1983 applies
to local govt's.
and local govt. agents

EXTRA EDITION NO. 1
Supreme Court
Opinions

June 6, 1978 • THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. • Vol. 46, No. 47

OPINIONS ANNOUNCED JUNE 6, 1978

The Supreme Court decided:

ALIENS AND CITIZENSHIP—Practice and Procedure

Section 106(a)(5)(B) of Immigration and Nationality Act, which provides that anyone who seeks review of deportation order, claims to be U.S. citizen, and makes showing that claim is not frivolous is entitled to federal district court de novo hearing of nationality claim, does not require "substantial evidence" of U.S. citizenship as prerequisite to such de novo review but merely requires "genuine issue of material fact" as to nationality claim; evidence in support of U.S. citizenship adduced by person sought to be deported, consisting of his own testimony and that of three witnesses which, if believed, would refute INS evidence, raises genuine issue of material fact. (Agosto v. Immigration and Naturalization Service, No. 76-1410) .... page 4600

*

CIVIL RIGHTS ACT—Municipalities

Municipalities and other local government units are "persons" that can be sued directly under 42 U.S.C. §1983 for monetary, declaratory, or injunctive relief where alleged unconstitutional action executes governmental policy or custom; such government entities, however, cannot be held liable on respondeat superior theory; Monroe v. Pape, 365 U.S. 167 (1961), to extent it holds that local governments are wholly immune from §1983 suits, is overruled. (Monell v. New York City Dept. of Social Services, No. 75-1914) .... page 4569

OIL AND GAS—Practice and Procedure

Section 15(7) of Interstate Commerce Act, which permits Interstate Commerce Commission to suspend operation of "any schedule stating a new individual or joint rate, fare, or charge," authorizes ICC to suspend initial tariff schedules of interstate carrier by pipeline subject to Act; ICC has authority to summarily fix maximum tariff rates allowed during such suspension period and to require carriers filing tariffs containing such rates, to refund any amounts collected that are ultimately found to be unlawful. (Trans Alaska Pipeline Rate Cases, No. 77-452) .... page 4587

SOCIAL SECURITY—Public Assistance

State public assistance program that extends emergency aid only to families eligible under Aid to Families With Dependent Children program can qualify for federal funding as other than program of "emergency aid to needy families with children" under Section 403 (a) (5) of Social Security Act, more particularly as AFDC "special needs" program under Section 403 (a) (1); neither Section 402 (a) (10) of Act, which makes mandatory only AFDC eligibility criteria of Section 406(a), nor Section 406(e), which defines permissible scope of emergency assistance program for purposes of federal funding, imposes mandatory eligibility standards on states that elect to participate in emergency assistance program. (Quern v. Mandley, No. 76-1159) .... page 4594

Full Text of Opinions

No. 75–1914

Jane Monell et al., Petitioners, *v.* Department of Social Services of the City of New York et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 6, 1978]

Syllabus

Petitioners, female employees of the Department of Social Services and the Board of Education of the City of New York, brought this class action against the Department and its Commissioner, the Board and its Chancellor, and the City of New York and its Mayor under 42 U. S. C. § 1983, which provides that every "person" who, under color of any statute, ordinance, regulation, custom, or usage of any State subjects, or "causes to be subjected," any person to the deprivation of any federally protected rights, privileges, or immunities shall be civilly liable to the injured party. In each case, the individual defendants were sued solely in their official capacities. The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. Cf. *Cleveland Board of Ed.* v. *LaFleur,* 414 U. S. 632. The District Court found that petitioners' constitutional rights had been violated, but held that petitioners' claims for injunctive relief were mooted by a supervening change in the official maternity leave policy. That court further held that *Monroe* v. *Pape,* 365 U. S. 167, barred recovery of backpay from the Department, the Board,

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and the City. In addition, to avoid circumvention of the immunity conferred by *Monroe*, the District Court held that natural persons sued in their official capacities as officers of a local government also enjoy the immunity conferred on local governments by that decision. The Court of Appeals affirmed on a similar theory. *Held:*

1. In *Monroe* v. *Pape, supra,* after examining the legislative history of the Civil Rights Act of 1871, now codified as 42 U. S. C. § 1983, and particularly the rejection of the so-called Sherman amendment, the Court held that Congress in 1871 doubted its constitutional authority to impose civil liability on municipalities and therefore could not have intended to include municipal bodies within the class of "persons" subject to the Act. Re-examination of this legislative history compels the conclusion that Congress in 1871 would *not* have thought § 1983 constitutionally infirm if it applied to local governments. In addition, that history confirms that local governments were intended to be included among the "persons" to which § 1983 applies. Accordingly, *Monroe* v. *Pape* is overruled insofar as it holds that local governments are wholly immune from suit under § 1983.

2. Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. In addition, local governments, like every other § 1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels.

3. On the other hand, the language and legislative history of § 1983 compel the conclusion that Congress did not intend a local government to be held liable solely because it employs a tortfeasor—in other words, a local government cannot be held liable under § 1983 on a *respondeat superior* theory.

4. Considerations of *stare decisis* do not counsel against overruling *Monroe* v. *Pape* insofar as it is inconsistent with this opinion.

(a) *Monroe* v. *Pape* departed from prior practice insofar as it completely immunized municipalities from suit under § 1983. Moreover, since the reasoning of *Monroe* does not allow a distinction to be drawn between municipalities and school boards, this Court's many cases holding school boards liable in § 1983 actions are inconsistent with *Monroe*, especially as the principle of that case was extended to suits for injunctive relief in *City of Kenosha* v. *Bruno,* 412 U. S. 507.

(b) Similarly, extending absolute immunity to school boards would be inconsistent with several instances in which Congress has refused to immunize school boards from federal jurisdiction under § 1983.

(c) In addition, municipalities cannot have arranged their affairs on an assumption that they can violate constitutional rights for an indefinite period; accordingly, municipalities have no reliance interest that would support an absolute immunity.

(d) Finally, it appears beyond doubt from the legislative history of the Civil Rights Act of 1871 that *Monroe* misapprehended the meaning of the Act. Were § 1983 unconstitutional as to local governments, it would have been equally unconstitutional as to state or local officers, yet the 1871 Congress clearly intended § 1983 to apply to such officers and all agreed that such officers could constitutionally be subjected to liability under § 1983. The Act also unquestionably was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights. Therefore, without a clear statement in the legislative history, which is not present, there is no justification for excluding municipalities from the "persons" covered by § 1983.

5. Local governments sued under § 1983 cannot be entitled to an absolute immunity, lest today's decision "be drained of meaning," *Scheuer* v. *Rhodes,* 416 U. S. 232, 248.

532 F. 2d 259, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined, and in Parts I, III, and V of which STEVENS, J., joined. POWELL, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in part. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, a class of female employees of the Department of Social Services and the Board of Education of the City of New York, commenced this action under 42 U. S. C. § 1983 in July 1971.[1] The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.[2] Cf. *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974). The suit sought injunctive relief and back pay for periods of unlawful forced leave. Named as defendants in the action were the Department and its Commissioner, the Board and its Chancellor, and the city of New York and its Mayor. In each case, the individual defendants were sued solely in their official capacities.[3]

On cross-motions for summary judgment, the District Court for the Southern District of New York held moot petitioners' claims for injunctive and declaratory relief since the city of New York and the Board, after the filing of the complaint, had changed their policies relating to maternity leaves so that no pregnant employee would have to take leave unless she was medically unable to continue to perform her job. 394 F. Supp. 853, 855. No one now challenges this conclusion. The court did conclude, however, that the acts complained of were unconstitutional under *LaFleur, supra.* 394 F. Supp., at 855. Nonetheless plaintiff's prayers for back pay were denied because any such damages would come ultimately from the City of New York and, therefore, to hold otherwise would be to "circumvent" the immunity conferred on municipalities by *Monroe* v. *Pape,* 365 U. S. 167 (1961). See 394 F. Supp., at 855.

On appeal, petitioners renewed their arguments that the Board of Education[4] was not a "municipality" within the meaning of *Monroe* v. *Pape, supra,* and that, in any event, the District Court had erred in barring a damage award against the individual defendants. The Court of Appeals for the Second Circuit rejected both contentions. The court first held that the Board of Education was not a person under

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[1] The complaint was amended on September 14, 1972 to allege a claim under Title VII of the 1964 Civil Rights Act, as amended, 42 U. S. C. § 2000e (1970 ed., and Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F. Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F. 2d 259, 261–262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U. S. 1071.

[2] The plaintiffs alleged that New York had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of an employee's agency allowed up to an additional two months of work. Amended Complaint ¶ 28, App. 13–14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶ 13, App. 32–33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher could remain through the end of the school term. Amended Complaint ¶¶ 39, 42, 45, App. 18–19, 21. This allegation was denied. Answer ¶¶ 18, 22, App. 35–37.

[3] Amended Complaint ¶ 24, App. 11–12.

[4] Petitioners conceded that the Department of Social Services enjoys the same status as New York City for *Monroe* purposes. See 532 F. 2d, at 263.

§ 1983 because "it performs a vital governmental function . . . , and, significantly, while it has the right to determine how the funds appropriated to it shall be spent . . . , it has no final say in deciding what its appropriations shall be." 532 F. 2d 259, 263 (1976) (citation omitted). The individual defendants, however, were "persons" under § 1983, even when sued solely in their official capacities. *Id.*, at 264. Yet, because a damage award would "have to be paid by a city that was held not to be amenable to such an action in *Monroe* v. *Pape*," a damage action against officials sued in their official capacities could not proceed. *Id.*, at 265.

We granted certiorari in this case, 429 U. S. 1071, to consider

> "Whether local governmental officials and/or local independent school boards are "persons" within the meaning of 42 U. S. C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?" Pet. for Cert. 8.

Although, after plenary consideration, we have decided the merits of over a score of cases brought under § 1983 in which the principal defendant was a school board[5]—and, indeed, in some of which § 1983 and its jurisdictional counterpart, 28 U. S. C. § 1343, provided the only basis for jurisdiction[6]—we indicated in *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 279 (1977), last Term that the question presented here was open and would be decided "another day." That other day has come and we now overrule *Monroe* v. *Pape*, *supra*, insofar as it holds that local governments are wholly immune from suit under § 1983.[7]

I

In *Monroe* v. *Pape*, we held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." 365 U. S., at 187. The sole basis for this conclusion was an inference drawn from Congress' rejection of the "Sherman amendment" to the bill which became Civil Rights Act of 1871, 17 Stat. 13—the precursor of § 1983—which would have held a municipal corporation liable for damage done to the person or property of its inhabitants by *private* persons "riotously and tumultuously assembled."[8] Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (hereinafter "Globe"). Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the nature of the obligation created by that amendment was vastly different from that created by § 1, the Court nonetheless concluded in *Monroe* that Congress must have meant to exclude municipal corporations from the coverage of § 1 because " 'the House [in voting against the Sherman amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any *obligation* upon county and town organizations, the mere instrumentality for the administration of state law.' " 365 U. S., at 190 (emphasis added), quoting Globe, at 804 (Rep. Poland). This statement, we thought, showed that Congress doubted its "constitutional power . . . to impose *civil liability* on municipalities," 365 U. S., at 190 (emphasis added), and that such doubt would have extended to any type of civil liability.[9]

A fresh analysis of debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support, shows, however, that *Monroe* incorrectly equated the "obligation" of which Representative Poland spoke with "civil liability."

A. An Overview

There are three distinct stages in the legislative consideration of the bill which became the Civil Rights Act of 1871. On March 28, 1871, Representative Shellabarger, acting for a House select committee, reported H. R. 320, a bill "to enforce the provisions of the Fourteenth Amendment to the Constitution and for other purposes." H. R. 320 contained four sections. Section 1, now codified as 42 U. S. C. § 1983, was the subject of only limited debate and was passed without amendment.[10] Sections 2 through 4 dealt primarily with the "other purpose" of suppressing Ku Klux Klan violence in the southern States.[11] The wisdom and constitutionality of these sections—not § 1, now § 1983—was the subject of almost all congressional debate and each of these sections was amended. The House finished its initial debates on H. R. 320 on April 7, 1871 and one week later the Senate also voted out a bill.[12] Again, debate on § 1 of the bill was limited and that section was passed as introduced.

Immediately prior to the vote on H. R. 320 in the Senate, Senator Sherman introduced his amendment.[13] This was *not* an amendment to § 1 of the bill, but was to be added as § 7 at the end of the bill. Under the Senate rules, no discussion of the amendment was allowed and, although attempts were made to amend the amendment, it was passed as introduced. In this form, the amendment did *not* place liability on municipal corporations, but made any inhabitant of a municipality liable for damage inflicted by persons "riotously or tumultuously assembled."[14]

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[5] *Milliken* v. *Bradley*, 433 U. S. 267 (1977); *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977); *Vorchheimer* v. *School District of Philadelphia*, 430 U. S. 703 (1977); *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976); *Milliken* v. *Bradley*, 418 U. S. 717 (1974); *Bradley* v. *School Board of the City of Richmond*, 416 U. S. 696 (1974); *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974); *Keyes* v. *School District No. 1*, 413 U. S. 189 (1973); *San Antonio School District* v. *Rodriguez*, 411 U. S. 1 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *Northcross* v. *City of Memphis Board of Education*, 397 U. S. 232 (1970); *Carter* v. *West Feliciana Parish School Board*, 396 U. S. 226 (1969); *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19 (1969); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503 (1969); *Monroe* v. *Board of Commissioners*, 391 U. S. 450 (1968); *Raney* v. *Board of Education*, 391 U. S. 443 (1968); *Green* v. *County School Board of New Kent County*, 391 U. S. 430 (1968); *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963); *Goss* v. *Board of Education*, 373 U. S. 683 (1963); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Orleans Parish School Board* v. *Bush*, 365 U. S. 569 (1961); *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

[6] *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 636 (1974); App., *Keyes* v. *School District No. 1*, O. T. 1972, No. 71–507, p. 4a; App., *Swann* v. *Charlotte-Mecklenburg Board of Education*, O. T. 1970, No. 281, p. 465a; Petition for Certiorari, *Northcross* v. *Board of Education*, O. T. 1969, No. 1136, p. 3; *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 504 (1969); *McNeese* v. *Board of Education*, 373 U. S. 668, 671 (1963).

[7] However, we do affirm *Monroe* v. *Pape*, 365 U. S. 167 (1961), insofar as it holds that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees. See Part II, *infra*.

[8] We expressly declined to consider "policy considerations" for or against municipal liability. See 365 U. S., at 191.

[9] Mr. Justice Douglas, the author of *Monroe*, has suggested that the municipal exclusion might more properly rest on a theory that Congress sought to prevent the financial ruin that civil rights liability might impose on municipalities. See *City of Kenosha* v. *Bruno*, 412 U. S. 507, 517–520 (1973). However, this view has never been shared by the Court, see *Monroe* v. *Pape*, *supra*, n. 7, at 190; *Moor* v. *County of Alameda*, 411 U. S. 693, 708 (1973), and the debates do not support this position.

[10] Globe, at 522.

[11] Briefly, § 2 created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, each aimed primarily at the Ku Klux Klan. Section 3 provided that the President could send the militia into any State wracked with Klan violence. Finally, § 4 provided for suspension of the writ of habeas corpus in enumerated circumstances, again primarily those thought to obtain where Klan violence was rampant. See Cong. Globe, 42d Cong., 1st Sess., App., at 335–336 (1871) (hereinafter "Globe App.").

[12] Globe, at 709.

[13] See *id.*, at 663, quoted in Appendix, *infra*, at 41–42.

The House refused to acquiesce in a number of amendments made by the Senate, including the Sherman amendment, and the respective versions of H. R. 320 were therefore sent to a conference committee. Section 1 of the bill, however, was not a subject of this conference since, as noted, it was passed verbatim as introduced in both Houses of Congress.

On April 18, 1871, the first conference committee completed its work on H. R. 320. The main features of the conference committee draft of the Sherman amendment were these:[15] First, a cause of action was given to persons injured by

> "any persons riotously and tumultuously assembled together; . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude . . . ."

Second, the act provided that the action would be against the county, city, or parish in which the riot had occurred and that it could be maintained by either the person injured or his legal representative. Third, unlike the amendment as proposed, the conference substitute made the government defendant liable on the judgment if it was not satisfied against individual defendants who had committed the violence. If a municipality were liable, the judgment against it could be collected

> "by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment [would become] a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof."

In the ensuing debate on the first conference report, which was the first debate of any kind on the Sherman amendment, Senator Sherman explained that the purpose of his amendment was to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property "responsible" for Ku Klux Klan damage.[16] Statutes drafted on a similar theory, he stated, had long been in force in England and were in force in 1871 in a number of States.[17] Nonetheless there were critical differences between the conference substitute and extant state and English statutes: the conference substitute, unlike most state riot statutes, lacked a short statute of limitations and imposed liability on the government defendant whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exerted all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished.[18]

The first conference substitute passed the Senate but was rejected by the House. House opponents, within whose ranks were some who had supported § 1, thought the Federal Government could not, consistent with the Constitution, obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters. And, because of this constitutional objection, opponents of the Sherman amendment were unwilling to impose damage liability for nonperformance of a duty which Congress could not require municipalities to perform. This position is reflected in Representative Poland's statement that is quoted in *Monroe*.[19]

Because the House rejected the first conference report a second conference was called and it duly issued its report. The second conference substitute for the Sherman amendment abandoned municipal liability and, instead, made "any person or persons having knowledge [that a conspiracy to violate civil rights was afoot], and having power to prevent or aid in preventing the same," who did not attempt to stop the same, liable to any person injured by the conspiracy.[20] The amendment in this form was adopted by both Houses of Congress and is now codified as 42 U. S. C. § 1986.

The meaning of the legislative history sketched above can most readily be developed by first considering the debate on the report of the first conference committee. This debate shows conclusively that the constitutional objections raised against the Sherman amendment—on which our holding in *Monroe* was based, see p. 5, *supra*—would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights. Because § 1 of the Civil Rights Act does not state expressly that municipal corporations come within its ambit, it is finally necessary to interpret § 1 to confirm that such corporations were indeed intended to be included within the "persons" to whom that section applies.

B. Debate on the First Conference Report

The style of argument adopted by both proponents and opponents of the Sherman amendment in both Houses of Congress was largely legal, with frequent references to cases decided by this Court and the supreme courts of the several States. Proponents of the Sherman amendment did not, however, discuss in detail the argument in favor of its constitutionality. Nonetheless, it is possible to piece together such an argument from the debates on the first conference report and those on § 2 of the civil rights bill, which, because it allowed the Federal Government to prosecute crimes "in the states," had also raised questions of federal power. The account of Representative Shellabarger, the House sponsor of H. R. 320, is the most complete.

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[14] *Ibid.* An action for recovery of damages was to be in the federal courts and denominated as a suit against the county, city, or parish in which the damage had occurred. *Ibid.* Execution of the judgment was not to run against the property of the government unit, however, but against the private property of any inhabitant. *Ibid.*

[15] See Globe, at 749 and 755, quoted in Appendix, *infra*, at 42–43.

[16] "Let the people of property in the southern States understand that if they will not make the hue and cry and take the necessary steps to put down lawless violence in those States their property will be holden responsible, and the effect will be most wholesome." Globe, at 761.

Senator Sherman was apparently unconcerned that the conference committee substitute, unlike the original amendment, did not place liability for riot damage directly on the property of the well-to-do, but instead placed it on the local government. Presumably he assumed that taxes would be levied against the property of the inhabitants to make the locality whole.

[17] According to Senator Sherman, the law had originally been adopted in England immediately after the Norman Conquest and had most recently been promulgated as the law of 7 & 8 Geo. IV, ch. 31. See Globe, at 760. During the course of the debates, it appeared that Kentucky, Maryland, Massachusetts, and New York had similar laws. See *id.*, at 751 (Rep. Shellabarger); *id.*, at 762 (Sen. Stevenson); *id.*, at 771 (Sen. Thurman); *id.*, at 792 (Rep. Butler). Such a municipal liability was apparently common throughout New England. See *id.*, at 761 (Sen. Sherman).

[18] In the Senate, opponents, including a number of Senators who had voted for § 1 of the bill, criticised the Sherman amendment as an imperfect and impolitic rendering of the state statutes. Moreover, as drafted, the conference substitute could be construed to protect rights that were not protected by the Constitution. A complete critique was given by Senator Thurman. See Globe, at 770–772.

[19] See 365 U. S., at 190, quoted at p. 5, *supra*.

[20] See Globe, at 804, quoted in Appendix, *infra*, at 43.

Shellabarger began his discussion of H. R. 320 by stating that "there is a domain of constitutional law involved in the right consideration of this measure which is wholly unexplored." Cong. Globe, 42d Cong., 1st Sess., App., at 67 (1871) (hereinafter "Globe App."). There were analogies, however. With respect to the meaning of § 1 of the Fourteenth Amendment, and particularly its Privileges or Immunities Clause, Shellabarger relied on the statement of Mr. Justice Washington in *Corfield* v. *Coryell,* 4 Wash. C. C. 371 (CCED Pa. 1825), which defined the privileges protected by Art. IV:

> " 'What these fundamental privileges are[,] it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government;'—
>
> *"Mark that—*
>
> " '*protection by the Government;* the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . .' " Globe App., at 69 (emphasis added), quoting 4 Wash. C. C., at 380.

Building on his conclusion that citizens were owed protection—a conclusion not disputed by opponents of the Sherman Amendment [21]—Shellabarger then considered Congress' role in providing that protection. Here again there were precedents:

> "[Congress has always] assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution. Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in [Art. I, § 10,] relate to the divisions of the political powers of the State and General Governments. . . . These prohibitions upon political powers of the States are all of such nature that they can be, and even have been, . . . enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.
>
> "These three are: first, that as to fugitives from justice [22]; second, that as to fugitives from service, (or slaves [23];) third, that declaring that the 'citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' [24]
>
> "And, sir, every one of these—the only provisions where it was deemed that legislation was required to enforce the constitutional provisions—the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for, Congress has by legislation affirmatively interfered to protect . . . such persons." Globe App., at 69–70.

Of legislation mentioned by Shellabarger, the closest analog of the Sherman amendment, ironically, was the statute implementing the fugitives from justice and fugitive slave provisions of Art. IV—the Act of Feb. 12, 1793, ch. 7, 1 Stat. 302—the constitutionality of which had been sustained in 1842, in *Prigg* v. *Pennsylvania,* 16 Pet. 539. There, Mr. Justice Story, writing for the Court, held that Art. IV gave slaveowners a federal right to the unhindered possession of their slaves in whatever State such slaves might be found. 16 Pet., at 612. Because state process for recovering runaway slaves might be inadequate or even hostile to the rights of the slaveowner, the right intended to be conferred could be negated if left to state implementation. *Id.,* at 614. Thus, since the Constitution guaranteed the right and this in turn required a remedy, Story held it to be a "natural inference" that Congress had the power itself to ensure an appropriate (in the Necessary and Proper Clause sense) remedy for the right. *Id.,* at 615.

Building on *Prigg,* Shellabarger argued that a remedy against municipalities and counties was an appropriate—and hence constitutional—method for ensuring the protection which the Fourteenth Amendment made every citizen's federal right.[25] This much was clear from the adoption of such statutes by the several States as devices for suppressing riot.[26] Thus, said Shellabarger, the only serious question remaining was "whether, since a county is an integer or part of a State, the United States can impose upon it, as such, *any obligations to keep the peace* in obedience to United States laws." [27] This he answered affirmatively, citing *Board of Commissioners* v. *Aspinwall,* 24 How. 376 (1861), the first of many cases [28] upholding the power of federal courts to enforce the Contract Clause against municipalities.[29]

House opponents of the Sherman amendment—whose views are particularly important since only the House voted down the amendment—did not dispute Shellabarger's claim that the Fourteenth Amendment created a federal right to protection, see n. 21, *supra,* but they argued that the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities. The most complete statement of this position is that of Representative Blair:[30]

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[21] See Globe, at 758 (Sen. Trumbull); *id.,* at 772 (Sen. Thurman); *id.,* at 791 (Rep. Willard). The Supreme Court of Indiana had so held in giving effect to the Civil Rights Act of 1866. See *Smith* v. *Moody,* 26 Ind. 299 (1866) (following *Coryell*), one of three state supreme court cases referred to in Globe App., at 68 (Rep. Shellabarger). Moreover, § 2 of the 1871 Act as passed, unlike § 1, prosecuted persons who violated federal rights whether or not that violation was under color of official authority, apparently on the theory that Ku Klux Klan violence was infringing the right of protection defined by *Coryell.* Nonetheless, opponents argued that municipalities were not generally charged by the States with keeping the peace and hence did not have police forces, so that the duty to afford protection ought not devolve on the municipality, but on whatever agency of state government was charged by the State with keeping the peace. See p. 14, and n. 30, *infra.* In addition, they argued that Congress could not constitutionally add to the duties of municipalities. See pp. 13–19, *infra.*

[22] U. S. Const., Art. IV, § 2, cl. 2:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

[23] *Id.,* cl. 3:

"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

[24] *Id.,* cl. 1.

[25] See Globe, at 751. See also *id.,* at 760 (Sen. Sherman) ("If a State may . . . pass a law making a county . . . responsible for a riot in order to deter such crime, then we may pass the same remedies . . . .").

[26] *Id.,* at 751; see n. 17, *supra.*

[27] Globe, at 751 (emphasis added). Compare this statement with Representative Poland's remark upon which our holding in *Monroe* was based. See p. 5, *supra.*

[28] See, *e. g., Gelpcke* v. *City of Dubuque,* 1 Wall. 175 (1864); *Von Hoffman* v. *City of Quincy,* 4 Wall. 535 (1867); *Riggs* v. *Johnson County,* 6 Wall. 166 (1868); *Weber* v. *Lee County,* 6 Wall. 210 (1868); *Supervisors* v. *Rogers,* 7 Wall. 175 (1869); *Benbow* v. *Iowa City,* 7 Wall. 313 (1869); *Supervisors* v. *Durant,* 9 Wall. 415 (1870). See generally C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–1888, chs. 17–18 (1971).

[29] See Globe, at 751–752.

> "The proposition known as the Sherman amendment . . . is entirely new. It is altogether without a precedent in this country. . . . That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. . . .
>
> ". . . [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to. The parallel of the hundred does not in the least meet the case. The power that laid the obligation upon the hundred first put the duty upon the hundred that it should perform in that regard, and failing to meet the obligation which had been laid upon it, it was very proper that it should suffer damage for its neglect. . . .
>
> ". . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, . . . where [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality. . . .
>
> "Now, only the other day, the Supreme Court . . . decided [in *Collector* v. *Day*, 11 Wall. 113 (1871)] that there is no power in the Government of the United States, under its authority to tax, to tax the salary of a State officer. Why? Simply because the power to tax involves the power to destroy, and it was not the intent to give the Government of the United States power to destroy the government of the States in any respect. It was held also in the case of Prigg *vs.* Pennsylvania [16 Pet. 539 (1842)] that it is not within the power of the Congress of the United States to lay duties upon a State officer; that we cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality which is equally the creature of the State, to perform a duty." Globe, at 795.

Any attempt to impute a unitary constitutional theory to opponents of the Sherman amendment is, of course, fraught with difficulties, not the least of which is that most Members of Congress did not speak to the issue of the constitutionality of the amendment. Nonetheless, two considerations lead us to conclude that opponents of the Sherman amendment found it unconstitutional substantially because of the reasons stated by Representative Blair: First, Blair's analysis is precisely that of Poland, whose views were quoted as authoritative in Monroe, see p. 5, *supra,* and that analysis was shared in large part by all House opponents who addressed the constitutionality of the Sherman amendment.[31] Second, Blair's exegesis of the reigning constitutional theory of his day, as we shall explain, was clearly supported by precedent—albeit precedent that has not survived, see *Ex Parte Virginia,* 100 U. S. 339, 347–348 (1880); *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 486 (1939)—and no other constitutional formula was advanced by participants in the House debates.

Collector v. *Day,* cited by Blair, was the clearest and, at the time of the debates, the most recent pronouncement of a doctrine of coordinate sovereignty that, as Blair stated, placed limits on even the enumerated powers of the National Government in favor of protecting State prerogatives. There, the Court held that the United States could not tax the income of Day, a Massachusetts state judge, because the independence of the States within their legitimate spheres would be imperiled if the instrumentalities through which States executed their powers were "subject to the control of another and distinct government." 11 Wall., at 127. Although the Court in *Day* apparently rested this holding in part on the proposition that the taxing "power acknowledges no limits but the will of the legislative body imposing the tax," *id.,* at 125–126; cf. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), the Court had in other cases limited other national powers in order to avoid interference with the States.[32]

In *Prigg* v. *Pennsylvania, supra,* for example, Mr. Justice Story, in addition to confirming a broad national power to legislate under the Fugitive Slave Clause, see p. 12, *supra,* held that Congress could not "insist that states . . . provide means to carry into effect the duties of the national government." 16 Pet., at 615–616.[33] And Mr. Justice McLean agreed that, "[a]s a general principle," it was true "that Congress had no power to impose duties on state officers, as provided in the [Act of 1793, *supra*]." Nonetheless he wondered whether Congress might not impose "positive" duties on state officers where a clause of the Constitution, like the Fugitive Slave

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[30] Others taking a view similar to Representative Blair's included: Representative Willard, see *id.,* at 791; Representative Poland, see *id.,* at 794; Representative Burchard, see *id.,* at 795; Representative Farnsworth, see *id.,* at 799. Representative Willard also took a somewhat different position. He thought that the Constitution would not allow the Federal Government to dictate the manner in which a State fulfilled its obligation of protection. That is, he thought it a matter of state discretion whether it delegated the peacekeeping power to a municipal or county corporation, to a sheriff, etc. He did not doubt, however, that the Federal Government could impose on the *States* the obligation imposed by the Sherman amendment, and presumably he would have enforced the amendment against a municipal corporation to which the peacekeeping obligation had been delegated. See *id.,* at 791.

Opponents of the Sherman amendment in the Senate agreed with Blair that Congress had no power to pass the Sherman amendment because it fell outside limits on national power implicit in the federal structure of the Constitution, and recognized in, *e. g., Collector* v. *Day,* 11 Wall. 113 (1871). However, the Senate opponents focused not on the amendment's attempt to obligate municipalities to keep the peace, but on the lien created by the amendment, which ran against *all* money and property of a defendant municipality, including property held for public purposes, such as jails or courthouses. Opponents argued that such a lien once entered would have the effect of making it impossible for the municipality to function, since no one would trade with it. See, *e. g.,* Globe, at 762 (Sen. Stevenson); *id.,* at 763 (Sen. Casserly). Moreover, everyone knew that sound policy prevented execution against public property since this too was needed if local government was to survive. See, *e. g., ibid.* See also *Meriwether* v. *Garrett,* 102 U. S. 472, 501, 513 (1880) (recognizing principle that public property of a municipality not subject to execution); 2 Dillon, Municipal Corporations §§ 445–446 (1873 ed.) (same).

Although the arguments of the Senate opponents appear to be a correct analysis of then-controlling constitutional and common-law principles, their arguments are not relevant to an analysis of the constitutionality of § 1 of the Civil Rights Act since any judgment under that section, as in any civil suit in the federal courts in 1871, would have been enforced pursuant to *state* laws under the process acts of 1792 and 1828. See Act of May 8, 1792, ch. 36, 1 Stat. 275; Act of May 19, 1828, ch. 68, 4 Stat. 278.

[31] See n. 30, *supra.*

[32] In addition to the cases discussed in text, see *Lane County* v. *Oregon,* 7 Wall. 71, 77, 81 (1869), in which the Court held that the federal legal tender acts should not be construed to require the States to accept taxes tendered in United States notes since this might interfere with a legitimate State activity.

[33] Chief Justice Taney agreed:

"The state officers mentioned in the law [of 1793] are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power, if it thinks proper, to prohibit them. The act

Clause, seemed to require affirmative government assistance, rather than restraint of government, to secure federal rights. See *id.*, at 664–665.

Had Justice McLean been correct in his suggestion that, where the Constitution envisioned affirmative government assistance, the States or their officers or instrumentalities could be required to provide it, there would have been little doubt that Congress could have insisted that municipalities afford by "positive" action the protection[34] owed individuals under § 1 of the Fourteenth Amendment whether or not municipalities were obligated by state law to keep the peace. However, any such argument, largely foreclosed by *Prigg,* was made impossible by the Court's holding in *Kentucky* v. *Dennison,* 24 How. 66 (1861). There, the Court was asked to require Dennison, the Governor of Ohio, to hand over Lago, a fugitive from justice wanted in Kentucky, as required by § 1 of the Act of 1793,[35] *supra,* which implemented Art. IV, § 2, cl. 2, of the Constitution. Chief Justice Taney, writing for a unanimous Court, refused to enforce that section of the Act:

> "[W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." 24 How., at 107–108.

The rationale of *Dennison*—that the Nation could not impose duties on state officers since that might impede States in their legitimate activities—is obviously identical to that which animated the decision in *Collector* v. *Day*. See p. 16, *supra*. And, as Blair indicated, municipalities as instrumentalities through which States executed their policies could be equally disabled from carrying out State policies if they were also obligated to carry out federally imposed duties. Although no one cited *Dennison* by name, the principle for which it stands was well known to Members of Congress,[36] many of whom discussed *Day*[37] as well as a series of state supreme court cases[38] in the mid-1860's which had invalidated a federal tax on the process of state courts on the ground that the tax threatened the independence of a vital state function.[39] Thus, there was ample support for Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to "destroy the government of the States." Globe, at 795.

If municipal liability under § 1 of the Civil Rights Act created a similar Hobson's choice, we might conclude, as *Monroe* did, that Congress could not have intended municipalities to be among the "persons" to which that section applied. But this is not the case.

First, opponents expressly distinguished between imposing an obligation to keep the peace and merely imposing civil liability for damages on a municipality that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment. Representative Poland, for example, reasoning from Contract Clause precedents, indicated that Congress could constitutionally confer jurisdiction on the federal courts to entertain suits seeking to hold municipalities liable for using their authorized powers in violation of the Constitution—which is as far as § 1 of the Civil Rights Act went:

> "I presume . . . that where a State had imposed a duty [to keep the peace] upon [a] municipality . . . an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction. But enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever." Globe, at 794.

Representative Burchard agreed:

> "[T]here is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance. But counties . . . do not have any control of the police . . . ." *Id.*, at 795.

See also the views of Rep. Willard, discussed at n. 30, *supra.*

Second, the doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it. Under the theory of dual sovereignty set out in *Prigg,* this is quite understandable. So long as federal courts were vindicating the Federal Constitution, they were providing the "positive" government action required to protect federal constitutional rights and no question was raised of enlisting the States in "positive" action. The limits of the principles announced in *Dennison* and *Day* are not so well defined in logic, but are clear as a matter of history. It must be remembered that the same Court which rendered *Day* also vigorously enforced the Contracts Clause against municipalities—an enforcement effort which included various forms of "positive" relief, such as ordering that taxes be levied and collected to discharge federal court judgments, once a constitutional infraction was found.[40] Thus, federal

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of 1793, therefore, must depend altogether for its execution upon the officers of the United States named in it." 16 Pet., at 630 (Taney, C. J.).

[34] See pp. 10–11, and n. 21, *supra.*

[35] "Be it enacted . . . That whenever the executive authority of any state in the Union . . . shall demand any person as a fugitive from justice . . . and shall moreover produce a copy of an indictment found . . . charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state . . . from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured . . . and to cause the fugitive to be delivered to such agent [of the demanding state] when he shall appear . . . ." 1 Stat. 302.

[36] "The Supreme Court of the United States has decided repeatedly that Congress can impose no duty on a State officer." Globe, at 799 (Rep. Farnsworth). See also *id.*, at 788–789 (Rep. Kerr).

[37] See, *e. g.*, Globe, at 764 (Sen. Davis); *ibid.* (Sen. Casserly); *id.*, 772 (Sen. Thurman) (reciting logic of *Day*); *id.*, at 777 (Sen. Frelinghuysen); *id.*, at 788–789 (Rep. Kerr) (reciting logic of *Day*); *id.*, at 793 (Rep. Poland); *id.*, at 799 (Rep. Farnsworth) (also reciting logic of *Day*).

[38] *Warren* v. *Paul,* 22 Ind. 276 (1864); *Jones* v. *Estate of Keep,* 19 Wis. 369 (1865); *Fifield* v. *Close,* 15 Mich. 505 (1867); *Union Bank* v. *Hill,* 3 Cold. (43 Tenn.) 325 (1866); *Smith* v. *Short,* 40 Ala. 385 (1867).

[39] See Globe, at 764 (Sen. Davis); *ibid.* (Sen. Casserley). See also T. Cooley, Constitutional Limitations *483–*484 (1871 ed.).

[40] See cases cited at n. 28, *supra.* Since this Court granted unquestionably "positive" relief in Contracts Clause cases, it appears that the distinction between the Sherman amendment and those cases was not that

judicial enforcement of the Constitution's express limits on state power, since it was done so frequently, must notwithstanding anything said in *Dennison* or *Day* have been permissible, at least so long as the interpretation of the Constitution was left in the hands of the judiciary. Since § 1 of the Civil Rights Act simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment—a situation precisely analogous to the grant of diversity jurisdiction under which the Contract Clause was enforced against municipalities—there is no reason to suppose that opponents of the Sherman amendment would have found any constitutional barrier to § 1 suits against municipalities.

Finally, the very votes of those Members of Congress, who opposed the Sherman amendment but who had voted for § 1, confirm that the liability imposed by § 1 was something very different from that imposed by the amendment. Section 1 without question could be used to obtain a damage judgment against state or municipal *officials* who violated federal constitutional rights while acting under color of law.[41] However, for *Prigg-Dennison-Day* purposes, as Blair and others recognized,[42] there was no distinction of constitutional magnitude between officers and agents—including corporate agents—of the State: both were state instrumentalities and the State could be impeded no matter over which sort of instrumentality the Federal Government sought to assert its power. *Dennison* and *Day*, after all, were not suits against municipalities but against *officers* and Blair was quite conscious that he was extending these cases by applying them to municipal corporations.[43] Nonetheless, Senator Thurman, who gave the most exhaustive critique of § 1—*inter alia* complaining that it would be applied to state officers, see Globe, at 217—and who opposed both § 1 and the Sherman amendment, the latter on *Prigg* grounds, agreed unequivocally that § 1 was constitutional.[44] Those who voted for § 1 must similarly have believed in its constitutionality despite *Prigg, Dennison*, and *Day*.

C. Debate on § 1 of the Civil Rights Bill

From the foregoing discussion, it is readily apparent that nothing said in debate on the Sherman amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment. The question remains, however, whether the general language describing those to be liable under § 1—"any person"—covers more than natural persons. An examination of the debate on § 1 and application of appropriate rules of construction shows unequivocally that § 1 was intended to cover legal as well as natural persons.

Representative Shellabarger was the first to explain the function of § 1:

> "[Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Globe App., at 68.

By extending a remedy to all people, including whites, § 1 went beyond the mischief to which the remaining sections of the 1871 Act were addressed. Representative Shellabarger also stated without reservation that the constitutionality of § 2 of the Civil Rights Act of 1866 controlled the constitutionality of § 1 of the 1871 Act, and that the former had been approved by "the supreme courts of at least three States of this Union" and by Mr. Justice Swayne, sitting on circuit, who had concluded "We have no doubt of the constitutionality of every provision of this act." *Ibid.* He then went on to describe how the courts would and should interpret § 1:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. . . . Chief Justice Jay and also Story say:
>
> "'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.'—1 *Story on Constitution*, sec. 429." Globe App., at 68.

The sentiments expressed in Representative Shellabarger's opening speech were echoed by Senator Edmunds, the manager of H. R. 320 in the Senate:

> "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [of 1866], which have since become a part of the Constitution." Globe, at 568.
>
> "[Section 1 is] so very simple and really reenacting the Constitution." *Id.*, at 569.

And he agreed that the bill "secure[ed] the rights of white men as much as of colored men." *Id.*, at 696.

In both Houses, statements of the supporters of § 1 corroborated that Congress, in enacting § 1, intended to give a broad remedy for violations of federally protected civil

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the former created a positive obligation whereas the latter imposed only a negative restraint. Instead, the distinction must have been that a violation of the Constitution was the predicate for "positive" relief in the Contracts Clause cases, whereas the Sherman amendment imposed damages without regard to whether a local government was in any way at fault for the breach of the peace for which it was to be held for damages. See p. 8, *supra*. While no one stated this distinction expressly during the debates, the inference is strong that Congressmen in 1871 would have drawn this distinction since it explains why Representatives Poland, Burchard, and Willard, see pp. 20–21, *supra*, could oppose the amendment while at the same time saying that the Federal Government might impose damages on a local government that had defaulted in a state-imposed duty to keep the peace and it also explains why everyone agreed that a state or municipal officer could constitutionally be held liable under § 1 for violations of the Constitution. See pp. 22–23, *infra*.

[41] See, *e. g.*, Globe, at 334 (Rep. Hoar); *id.*, at 365 (Rep. Arthur); *id.*, at 367–368 (Rep. Sheldon); *id.*, at 385 (Rep. Lewis); Globe App., at 217 (Sen. Thurman). In addition, officers were included among those who could be sued under the second conference substitute for the Sherman Amendment. See Globe, at 805 (exchange between Rep. Willard and Rep. Shellabarger). There were no constitutional objections to the second report.

[42] See Globe, at 795 (Rep. Blair); *id.*, at 788 (Rep. Kerr); *id.*, at 795 (Rep. Burchard); *id.*, at 799 (Rep. Farnsworth).

[43] "[W]e cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality . . . ." Globe, at 795.

[44] See Globe App., at 216–217, quoted, *infra*, at n. 45. In 1879, moreover, when the question of the limits of the *Prigg* principle was squarely presented in *Ex parte Virginia*, 100 U. S. 339 (1880), this Court held that *Dennison* and *Day* and the principle of federalism for which they stand did not prohibit federal enforcement of § 5 of the Fourteenth Amendment through suits directed to state officers. See 100 U. S., at 345–348.

rights.[45] Moreover, since municipalities through their official acts, could equally with natural persons create the harms intended to be remedied by § 1, and, further, since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1. Cf., *e. g., Ex parte Virginia,* 100 U. S. 339, 346–347 (1880); *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 286–287, 294–296 (1913). One need not rely on this inference alone, however, for the debates show that Members of Congress understood "persons" to include municipal corporations.

Representative Bingham, for example, in discussing § 1 of the bill, explained that he had drafted § 1 of the Fourteenth Amendment with the case of *Barron* v. *Baltimore,* 7 Pet. 243 (1834), especially in mind. "In [that] case the *city* had taken private property for public use, without compensation . . . , and there was no redress for the wrong . . . ." Globe App., at 84 (emphasis added). Bingham's further remarks clearly indicate his view that such takings by cities, as had occurred in *Barron,* would be redressable under § 1 of the bill. See *id.,* at 85. More generally, and as Bingham's remarks confirm, § 1 of the bill would logically be the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment unequivocally prohibited uncompensated takings.[46] Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken.[47]

In addition, by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. This had not always been so. When this Court first considered the question of the status of corporations, Chief Justice Marshall, writing for the Court, denied that corporations "as such" were persons as that term was used in Art. III and the Judiciary Act of 1789. See *Bank of the United States* v. *Deveaux,* 5 Cranch 61, 86 (1809).[48] By 1844, however, the *Deveaux* doctrine was unhesitatingly abandoned:

> "[A] corporation created by and doing business in a particular state, is to be deemed *to all intents and purposes as a person,* although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person." *Louisville R. Co.* v. *Letson,* 2 How. 497, 558 (1844) (emphasis added), discussed in Globe, at 752.

And only two years before the debates on the Civil Rights Act, in *Cowles* v. *Mercer County,* 7 Wall. 118, 121 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts[49] and this fact was well known to Members of Congress.[50]

That the "usual" meaning of the word person would extend to municipal corporations is also evidenced by an Act of Congress which had been passed only months before the Civil Rights Act was passed. This Act provided that

> "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense[]." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

Municipal corporations in 1871 were included within the phrase "bodies politic and corporate"[51] and, accordingly, the

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[45] Representative Bingham, the author of § 1 of the Fourteenth Amendment, for example, declared the bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution." Globe App., at 81. He continued:

"The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws. . . . [And] the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. . . . They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?" *Id.,* at 85.

Representative Perry, commenting on Congress' action in passing the civil rights bill also stated:

"Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied. We have asserted as clearly as we can assert our belief that it is the duty of Congress to redress that mischief. We have also asserted as fully as we can assert the constitutional right of Congress to legislate." Globe, at 800.

See also *id.,* at 376 (Rep. Lowe); *id.,* at 428–429 (Rep. Beatty); *id.,* at 448 (Rep. Butler); *id.,* at 475–477 (Rep. Dawes); *id.,* at 578–579 (Sen. Trumbull); *id.,* at 609 (Sen. Pool); Globe App., at 182 (Rep. Mercur).

Other supporters were quite clear that § 1 of the act extended a remedy not only where a State had passed an unconstitutional statute, but also where officers of the State were deliberately indifferent to the rights of black citizens:

"But the chief complaint is [that] by a systematic maladministration of [state law], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe [§ 5 of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." Globe App., at 153 (Mr. Garfield). See also *Monroe* v. *Pape, supra,* n. 7, at 171–187.

Importantly for our inquiry, even the opponents of § 1 agreed that it was constitutional and, further, that it swept very broadly. Thus, Senator Thurman, who gave the most exhaustive critique of § 1, said:

"This section relates wholly to civil suits. . . . Its whole effect is to give to the Federal Judiciary that which now does not belong to it—*a jurisdiction that may be constitutionally conferred upon it, I grant,* but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . .

. . . . .

"*[T]here is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used.*" Globe App., at 216–217 (emphasis added).

[46] See Story, Commentaries on the Constitution of the United States § 1956 (Cooley ed. 1873).

[47] Indeed the federal courts found no obstacle to awards of damages against municipalities for common-law takings. See *Sumner* v. *Philadelphia,* 23 F. Cas. 392 (CCED Pa. 1873) (No. 13,611) (awarding damages of $2,273.36 and costs of $346.35 against the city of Philadelphia).

[48] Nonetheless, suits could be brought in federal court if the natural persons who were members of the corporation were of diverse citizenship from the other parties to the litigation. See 5 Cranch, at 91.

[49] See n. 28, *supra.*

[50] See, *e. g.,* Globe, at 777 (Sen. Sherman); *id.,* at 752 (Rep. Shellabarger) ("counties, cities, and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States.").

[51] See *Northwestern Fertilizing Co.* v. *Hyde Park,* 18 F. Cas. 393, 394 (CCND Ill. 1873) (No. 10,336); 2 Kent's Commentaries *278–*279 (12th O. W. Holmes ed. 1873). See also *United States* v. *Maurice,* 2 Brock. 96, 109 (CC Va. 1823) (Marshall, C. J.) ("The United States is a government, and, consequently, a body politic and corporate"); Brief for Petitioner in *Monroe* v. *Pape,* O. T. 1960, No. 39, App's. D and E (collecting state statutes which, in 1871, defined municipal corporations as bodies politic and corporate).

"plain meaning" of § 1 is that local government bodies were to be included within the ambit of the persons who could be sued under § 1 of the Civil Rights Act. Indeed, a Circuit Judge, writing in 1873 in what is apparently the first reported case under § 1, read the Dictionary Act in precisely this way in a case involving a corporate plaintiff and a municipal defendant.[52] See *Northwestern Fertilizing Co.* v. *Hyde Park,* 18 F. Cas. 393, 394 (CCND Ill. 1873) (No. 10,336).[53]

II

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.[54] Local governing bodies,[55] therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 167–168 (1970): "Congress included custom and usage [in § 1983] because of persistent and widespread discriminatory practices of State officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." [56]

On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

We begin with the language of § 1983 as passed:

> "[*A*]*ny person who,* under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected,* any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." Globe App., at 335 (emphasis added).

The italicized language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that *A*'s tort became *B*'s liability if *B* "caused" *A* to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent.[57] See *Rizzo* v. *Goode,* 423 U. S. 362, 370–371 (1976).

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[52] The court also noted that there was no discernible reason why persons injured by municipal corporations should not be able to recover. See 18 F. Cas., at 394.

[53] In considering the effect of the Act of Feb. 25, 1871 in *Monroe,* however, Justice Douglas, apparently focusing on the word "may," stated: "this definition [of person] is merely an allowable, not a mandatory, one." 365 U. S., at 191. A review of the legislative history of the Dictionary Act shows this conclusion to be incorrect.

There is no express reference in the legislative history to the definition of person, but Senator Trumbull, the Act's sponsor, discussed the phrase "words importing the masculine gender *may* be applied to females," (emphasis added), which immediately precedes the definition of person, and stated:

"The only object [of the Act] is to get rid of a great deal of verbosity in our statutes by providing that when the words 'he' is used it *shall* include females as well as males[]." Congressional Globe, 41st Cong., 3d Sess., 775 (Jan. 27, 1871) (emphasis added).

Thus, in Trumbull's view the word "may" meant "shall." Such a mandatory use of the extended meanings of the words defined by the Act is also required for it to perform its intended function—to be a guide to "rules of construction" of Acts of Congress. See *id.,* at 775 (Remarks of Sen. Trumbull). Were the defined words "allowable, [but] not mandatory" constructions, as *Monroe* suggests, there would be no "rules" at all. Instead, Congress must have intended the definitions of the Act to apply across-the-board except where the Act by its terms called for a deviation from this practice—"[where] the context shows that [defined] words were to be used in a more limited sense." Certainly this is how the *Northwestern Fertilizing* court viewed the matter. Since there is nothing in the "context" of § 1 of the Civil Rights Act calling for a restricted interpretation of the word "person," the language of that section should prima facie be construed to include "bodies politic" among the entities that could be sued.

[54] There is certainly no constitutional impediment to municipal liability. "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken* v. *Bradley,* 433 U. S. 267, 291 (1977); see *Ex parte Virginia,* 100 U. S. 339, 347–348 (1880). For this reason, *National League of Cities* v. *Usery,* 426 U. S. 833 (1976), is irrelevant to our consideration of this case. Nor is there any basis for concluding that the Eleventh Amendment is a bar to municipal liability. See, *e. g., Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 456 (1976); *Lincoln County* v. *Luning,* 133 U. S. 529, 530 (1890). Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes.

[55] Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent—at least where Eleventh Amendment considerations do not control analysis—our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

[56] See also Justice Frankfurter's statement for the Court in *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 369 (1940):

"It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text."

[57] Support for such a conclusion can be found in the legislative history. As we have indicated, there is virtually no discussion of § 1 of the Civil Rights Act. Again, however, Congress' treatment of the Sherman amendment gives a clue to whether it would have desired to impose *respondeat superior* liability.

The primary constitutional justification for the Sherman amendment was that it was a necessary and proper remedy for the failure of localities to protect citizens as the Privileges or Immunities Clause of the Fourteenth Amendment required. See pp. 10–13, *supra.* And according to Sherman, Shellabarger, and Edmunds, the amendment came into play only when a locality was at fault or had knowingly neglected its duty to provide protection. See Globe, at 761 (Sen. Sherman); *id.,* at 756 (Sen. Edmunds); *id.,* at 751–752 (Rep. Shellabarger). But other proponents of the amendment apparently viewed it as a form of vicarious liability for the unlawful acts of the citizens of the locality. See *id.,* at 792 (Rep. Butler). And whether intended or not, the amendment as drafted did impose a species of vicarious liability on municipalities since it could be construed to impose

Equally important, creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional. To this day, there is disagreement about the basis for imposing liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship. See W. Prosser, Law of Torts, § 69, at 569 (4th ed. 1971). Nonetheless, two justifications tend to stand out. First is the commonsense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the cost of accidents. See, *e. g., ibid.;* 2 F. Harper & F. James, The Law of Torts, § 26.3, at 1368–1369 (1956). Second is the argument that the cost of accidents should be spread to the community as a whole on an insurance theory. See, *e. g., id.,* § 26.5; W. Prosser, *supra,* at 459.[58]

The first justification is of the same sort that was offered for statutes like the Sherman amendment: "The obligation to make compensation for injury resulting from riot is, by arbitrary enactment of statutes; affirmatory law, and the reason of passing the statute is to secure a more perfect police regulation." Globe, at 777 (Sen. Frelinghuysen). This justification was obviously insufficient to sustain the amendment against perceived constitutional difficulties and there is no reason to suppose that a more general liability imposed for a similar reason would have been thought less constitutionally objectionable. The second justification was similarly put forward as a justification for the Sherman amendment: "we do not look upon [the Sherman amendment] as a punishment . . . . It is a mutual insurance." *Id.,* at 792 (Rep. Butler). Again, this justification was insufficient to sustain the amendment.

We conclude, therefore, that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see pp. 1–2, and n. 2, *supra,* we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases and we expressly leave further development of this action to another day.

III

Although we have stated that *stare decisis* has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes through legislation, see, *e. g., Edelman* v. *Jordan,* 415 U. S. 651, 671, and n. 14 (1974), we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes. See, *e. g., Continental T. V., Inc.* v. *GTE Sylvania Inc.,* 433 U. S. 36, 47–49 (1977); *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406 n. 1 (1932) (Brandeis, J., dissenting) (collecting cases). Nor is this a case where we should "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States,* 328 U. S. 61, 70 (1946).

First, *Monroe* v. *Pape, supra,* insofar as it completely immunizes municipalities from suit under § 1983, was a departure from prior practice. See, *e. g., Northwestern Fertilizing Co.* v. *Hyde Park, supra; City of Manchester* v. *Leiby,* 117 F. 2d 661 (CA1 1941); *Hannan* v. *City of Haverhill,* 120 F. 2d 87 (CA1 1941); *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943); *Holmes* v. *City of Atlanta,* 350 U. S. 879 (1955), in each of which municipalities were defendants in § 1983 suits.[59] Moreover, the constitutional defect that led to the rejection of the Sherman amendment would not have distinguished between municipalities and school boards, each of which is an instrumentality of state administration. See pp. 14–22, *supra.* For this reason, our cases—decided both before and after *Monroe,* see n. 5, *supra*—holding school boards liable in § 1983 actions are inconsistent with *Monroe,* especially as *Monroe's* immunizing principle was extended to suits for injunctive relief in *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973).[60] And although in many of these cases jurisdiction was not questioned, we ought not "disregard the implications of an exercise of judicial authority assumed to be proper for [100] years." *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 307 (1962); see *Bank of the United States* v. *Deveaux, supra,* at 88 (Marshall, C. J.) ("Those decisions are not cited as authority . . . but they have much weight, as they show that this point neither occurred to the bar or the bench"). Thus, while we have reaffirmed *Monroe* without further examination on three occasions,[61] it can scarcely be said that *Monroe* is so consistent with the warp and woof of civil rights law as to be beyond question.

Second, the principle of blanket immunity established in *Monroe* cannot be cabined short of school boards. Yet such

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liability even if a municipality did not know of an impending or ensuing riot or did not have the wherewithall to do anything about it. Indeed, the statute held a municipality liable even if it had done everything in its power to curb the riot. See p. 8, *supra;* Globe, at 761 (Sen. Stevens); *id.,* at 771 (Sen. Thurman); *id.,* at 788 (Rep. Kerr); *id.,* at 791 (Rep. Willard). While the first conference substitute was rejected principally on constitutional grounds, see *id.,* at 804 (Rep. Poland), it is plain from the text of the second conference substitute—which limited liability to those who, having the power to intervene against Ku Klux violence, "neglect[ed] or refuse[d] so to do," see Appendix, *infra,* at 41, and which was enacted as § 6 of the 1871 Act and is now codified as 42 U. S. C. § 1986—that Congress also rejected those elements of vicarious liability contained in the first conference substitute even while accepting the basic principle that the inhabitants of a community were bound to provide protection against the Ku Klux Klan. Strictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees. Nonetheless, when Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability, the inference that Congress did not intend to impose such liability is quite strong.

[58] A third justification, often cited but which on examination is apparently insufficient to justify the doctrine of *respondeat superior,* see, *e. g.,* 2 F. Harper & F. James, *supra,* n. 61, § 26.3, is that liability follows the right to control the actions of a tortfeasor. By our decision in *Rizzo* v. *Goode,* 423 U. S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability. See *id.,* at 370–371.

[59] Each case cited by *Monroe,* see 356 U. S., at 191 n. 50, as consistent with the position that local governments were not § 1983 "persons" reached its conclusion by assuming that state-law immunities overrode the § 1983 cause of action. This has never been the law.

[60] Although many suits against school boards also include private individuals as parties, the "principal defendant is usually the local board of education or school board." *Milliken* v. *Bradley, supra,* n. 4, at 292–293 (Powell, J., concurring).

[61] *Moor* v. *County of Alameda,* 411 U. S. 693 (1973); *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973); *Aldinger* v. *Howard,* 427 U. S. 1 (1976).

an extension would itself be inconsistent with recent expressions of congressional intent. In the wake of our decisions, Congress not only has shown no hostility to federal court decisions against school boards, but it has indeed rejected efforts to strip the federal courts of jurisdiction over school boards.[62] Moreover, recognizing that school boards are often defendants in school desegregation suits, which have almost without exception been § 1983 suits, Congress has twice passed legislation authorizing grants to school boards to assist them in complying with federal court decrees.[63] Finally, in the Civil Rights Attorneys' Fees Award Act of 1976, 90 Stat. 2641, which allows prevailing parties (in the discretion of the court) in § 1983 suits to obtain attorneys fees from the losing party, the Senate stated:

> "[D]efendants in these cases are often State or local *bodies* or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, *in his official capacity*, from funds of his agency or under his control, or *from the State or local government* (*whether or not the agency or government is named as a party*). S. Rep. No. 94–1101, at 5 (emphasis added; footnotes omitted).

Far from showing that Congress has relied on *Monroe*, therefore, events since 1961 show that Congress has refused to extend the benefits of *Monroe* to school boards and has attempted to allow awards of attorneys' fees against local governments even though *Monroe*, *City of Kenosha* v. *Bruno*, *supra*, and *Aldinger* v. *Howard*, 427 U. S. 1 (1976), have made the joinder of such governments impossible.[64]

Third, municipalities can assert no reliance claim which can support an absolute immunity. As Mr. Justice Frankfurter said in *Monroe*, "[t]his is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision." 365 U. S., at 221–222 (dissent). Indeed, municipalities simply cannot "arrange their affairs" on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement. And it scarcely need be mentioned that nothing in *Monroe* encourages municipalities to violate constitutional rights or even suggests that such violations are anything other than completely wrong.

Finally, even under the most stringent test for the propriety of overruling a statutory decision proposed by Mr. Justice Harlan in *Monroe*[65]—"that it must appear beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the [section]," *Monroe* v. *Pape*, *supra*, at 192 (concurring opinion)—the overruling of *Monroe* insofar as it holds that local governments are not "persons" who may be defendants in § 1983 suits is clearly proper. It is simply beyond doubt that, under the 1871 Congress' view of the law, were § 1983 liability unconstitutional as to local governments, it would have been equally unconstitutional as to state officers. Yet everyone—proponents and opponents alike—knew § 1983 would be applied to state officers and nonetheless stated that § 1983 was constitutional. See pp. 21–22, *supra*. And, moreover, there can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights. Therefore, absent a clear statement in the legislative history supporting the conclusion that § 1 was not to apply to the official acts of a municipal corporation—which simply is not present—there is no justification for excluding municipalities from the "persons" covered by § 1.

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[62] During the heyday of the furor over busing, both the House and the Senate refused to adopt bills that would have removed from the federal courts jurisdiction

> "to make any decision, enter any judgment, or issue any order requiring any *school board* to make any change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system, or requiring any *school board* to transport any students from public school to another public school or from one place to another place or from one school district to another school district or denying to any student the right or privilege of attending any public school or class at any public school chosen by the parent of such student in conformity with a freedom of choice system, or requiring any *school board* to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial composition of the student body at any public school, or precluding any *school board* from carrying into effect any provision of any contract between it and any member of the faculty of any public school it operates specifying the public school where the member of the faculty is to perform his or her duties under the contract." S. 179, 93d Cong., 1st Sess., § 1207 (1971) (emphasis added).

Other bills designed either completely to remove the federal courts from the school desegregation controversy, S. 287, 93d Cong., 1st Sess. (1973), or to limit the ability of federal courts to subject school boards to remedial orders in desegregation cases, S. 619, 93d Cong., 1st Sess. (1973); S. 179, 93d Cong., 1st Sess., § 2 (a) (1973); H. R. 13534, 92d Cong., 2d Sess., § 2922 (1972), have similarly failed.

[63] In 1972, spurred by a finding "that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access," 20 U. S. C. § 1601 (a) (Supp. V, 1975), Congress passed the 1972 Emergency School Act. Section 643 (a)(1)(A)(i) of that Act, 20 U. S. C. § 1605 (a)(1)(A)(i) (Supp. V, 1975), authorizes the Assistant Secretary

> "to make a grant to, or a contract with, *a local educational agency* [*which*] *is implementing a plan which has been undertaken pursuant to a final order issued by a court of the United States* . . . which requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of such agency, or otherwise requires the elimination or reduction of minority group isolation in such schools." (Emphasis added.)

A "local educational agency" is defined by 20 U. S. C. § 1619 (8) (Supp. V, 1975), as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, public elementary or secondary schools in a city, county, township, school, or other political subdivision of a State, or a federally recognized Indian reservation, or such combination of school districts, or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools, or a combination of local educational agencies . . . ." Congress thus clearly recognized that school boards were often parties to federal school desegregation suits. In § 718 of the Act, 20 U. S. C. § 1617 (Supp. V, 1975), Congress gave its explicit approval to the institution of federal desegregation suits against school boards—presumably under § 1983. That section provides:

> "Upon the entry of a final order *by a court of the United States against a local education agency* . . . for discrimination on the basis of race, color, or national origin in violation of . . . the fourteenth amendment to the Constitution of the United States . . . the court may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis added.)

Two years later, Congress found that "the implementation of desegregation plans that require extensive student transportation has, in many cases, required *local educational agencies* to expand [*sic*] large amounts of funds, thereby depleting their financial resources . . . . 20 U. S. C. § 1702 (a) (3). (Emphasis added.) Congress did not respond by declaring that school boards were not subject to suit under § 1983 or any other federal statute, "but simply [legislated] revised evidentiary standards and remedial priorities to be employed by the courts in deciding such cases." Brief for National Education Assn., at 15–16. Indeed, Congress expressly reiterated that a cause of action, cognizable in the federal courts, exists for discrimination in the public school context. 20 U. S. C. §§ 1703, 1706, 1708, 1710, 1718. The Act assumes that school boards will usually be the defendants in such suits. For example, § 211 of the Act, 20 U. S. C. § 1710 provides:

> "The Attorney General shall not institute a civil action under section 1706 of this title [which allows for suit by both private parties and the Attorney General to redress discrimination in public education] before he—
>
> "(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of part [the prohibitions against discrimination in public education]."

Section 219 of the Act, 20 U. S. C. § 1718, provides for the termination of court ordered busing "if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof."

[64] Whether Congress' attempt is in fact effective is the subject of *Hutto* v. *Finney*, 1977 Term, No. 76–1660, and therefore we express no view on it here.

[65] We note, however, that Mr. Justice Harlan's test has not been expressly adopted by this Court. Moreover, that test is based on two factors: *stare decisis* and "indications of congressional acceptance of this Court's earlier interpretation [of the statute in question]." 365 U. S., at 192. As we have explained, the second consideration is not present in this case.

For the reasons stated above, therefore, we hold that *stare decisis* does not bar our overruling of *Monroe* insofar as it is inconsistent with Parts I and II of this opinion.[66]

IV

Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties nor addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 "be drained of meaning," *Scheuer* v. *Rhodes*, 416 U. S. 232, 248 (1974). Cf. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 389, 397–398 (1971).

V

For the reasons stated above, the judgment of the Court of Appeals is

Reversed.

APPENDIX

As proposed, the Sherman amendment was as follows:

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs, and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction." Globe, at 663.

The complete text of the first conference substitute for the Sherman amendment is:

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment." Globe, at 749 and 755.

The relevant text of the second conference substitute for the Sherman amendment is as follows:

> "[A]ny person or persons having knowledge that any of

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[66] No useful purpose would be served by an attempt at this late date to determine whether *Monroe* was correct on its facts. Similarly, since this case clearly involves official policy and does not involve *respondeat superior*, we do not assay a view on how our cases which have relied on that aspect of *Monroe* that is overruled today—*Moor* v. *County of Alameda*, *supra*, n. 9, *City of Kenosha* v. *Bruno*, *supra*, n. 9, and *Aldinger* v. *Howard*, *supra*, n. 63—should have been decided on a correct view of § 1983. Nothing we say today affects the conclusion reached in *Moor*, see 411 U. S., at 703–704, that 42 U. S. C. § 1988 cannot be used to create a federal cause of action where § 1983 does not otherwise provide one or the conclusion reached in *City of Kenosha*, see 412 U. S., at 513, that "nothing . . . suggest[s] that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them."

> the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, *shall neglect or refuse so to do,* and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives." Globe, at 804 (emphasis added).

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and add these additional views.

Few cases in the history of the Court have been cited more frequently than *Monroe* v. *Pape*, 365 U. S. 167 (1961), decided less than two decades ago. Focusing new light on 42 U. S. C. § 1983, that decision widened access to the federal courts and permitted expansive interpretations of the reach of the 1871 measure. But *Monroe* exempted local governments from liability at the same time it opened wide the courthouse door to suits against officers and employees of those entities—even when they act pursuant to express authorization. The oddness of this result, and the weakness of the historical evidence relied on by the *Monroe* Court in support of it, are well demonstrated by the Court's opinion today. Yet the gravity of overruling a part of so important a decision prompts me to write.

I

In addressing a complaint alleging unconstitutional police conduct that probably was unauthorized and actionable under state law,[1] the *Monroe* Court treated the 42d Congress' rejection of the Sherman Amendment as conclusive evidence of an intention to immunize local governments from all liability under the statute for constitutional injury. That reading, in light of today's thorough canvass of the legislative history, clearly "misapprehended the meaning of the controlling provision," *Monroe, supra,* at 192 (Harlan, J., concurring). In this case, involving formal, written policies of the Department of Social Services and the Board of Education of the City of New York that are alleged to conflict with the command of the Due Process Clause, cf. *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974), the Court decides "not to reject [wisdom] merely because it comes too late," *Henslee* v. *Union Planters Bank,* 335 U. S. 595, 600 (1949) (Frankfurter, J., dissenting).

As the Court demonstrates, the Sherman Amendment presented an extreme example of "riot act" legislation that sought to impose vicarious liability on government subdivisions for the consequences of private lawlessness. As such, it implicated concerns that are of marginal pertinence to the operative principle of § 1 of the 1871 legislation—now § 1983—that "[e]very person" acting "under color of" state law may be held liable for affirmative conduct that "subjects, or causes to be subjected, any person to the deprivation of any" federal constitutional or statutory right. Of the many reasons for the defeat of the Sherman proposal, none supports *Monroe's* observation that the 42d Congress was fundamentally "antagonistic," 365 U. S., at 191, to the proposition that government entities and natural persons alike should be held accountable for the consequences of conduct directly working a constitutional violation. Opponents in the Senate appear to have been troubled primarily by the proposal's unprecedented lien provision, which would have exposed even property held for public purposes to the demands of § 1983 judgment lienors. Opinion of the Court, *ante,* at 14 n. 30. The opposition in the House of Representatives focused largely on the Sherman Amendment's attempt to impose a peacekeeping obligation on municipalities when the Constitution itself imposed no such affirmative duty and when many municipalities were not even empowered under state law to maintain police forces. *Ante,* at 14–16, 20–22.[2]

The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the "under color of" state law language of § 1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be *exclusively* liable for resulting constitutional injury.[3]

As elaborated in Part II of today's opinion, the rejection of the Sherman Amendment can best be understood not as evidence of Congress' acceptance of a rule of absolute municipal immunity, but as a limitation of the statutory ambit to actual wrongdoers, *i. e.,* a rejection of *respondeat superior* or any other principle of vicarious liability. Cf. Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo. L. J. 1483, 1531–1535 (1977). Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right and there is no qualified immunity, see *Wood* v. *Strickland,* 420 U. S. 208 (1975); *Procunier* v. *Navarette,* — U. S. — (1978). Today the Court recognizes that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.

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[1] The gravamen of the complaint in *Monroe* was that Chicago police officers acting "under color of" state law had conducted a warrantless, early morning raid and ransacking of a private home. Although at least one of the allegations in the complaint could have been construed to charge a custom or usage of the Police Department of the City of Chicago that did not violate state law, see 365 U. S., at 258–259 (Frankfurter, J., dissenting in part), and there is a hint of such a theory in petitioners' brief, O. T. 1960, No. 39, pp. 41–42, that feature of the case was not highlighted in this Court. The dispute that divided the Court was over whether a complaint alleging police misconduct in violation of state law, for which state judicial remedies were available, stated a § 1983 claim in light of the statutory requirement that the conduct working injury be "under color of" state law. Compare 365 U. S., at 172–183 (opinion of the Court), and *id.,* at 193–202 (Harlan, J., concurring), with *id.,* at 202–259 (Frankfurter, J., dissenting in part).

[2] If in the view of House opponents, such as Representatives Poland, Burchard, and Willard, see opinion of the Court, *ante,* at 20–21, a municipality obligated by state law to keep the peace could be held liable for a failure to provide equal protection against private violence, it seems improbable that they would have opposed imposition of liability on a municipality for the affirmative implementation of policies promulgated within its proper sphere of operation under state law. Such liability is premised not on a failure to take affirmative action in an area outside the contemplation of the state-law charter—the sort of liability that would have been imposed by the Sherman Amendment—but on the consequences of activities actually undertaken within the scope of the powers conferred by state law.

[3] The view taken today is consistent with the understanding of the 42d Congress that unless the context revealed a more limited definition, "the word 'person' may extend and be applied to bodies politic and corporate, . . ." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. It also accords with the interpretation given the same word when it was used by Senator Sherman in the antitrust legislation of 1890 bearing his name. See *Lafayette* v. *Louisiana Power & Light Co.,* — U. S. — (1978) (plurality opinion); *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 396 (1906); cf. *Pfizer, Inc.* v. *Government of India,* — U. S. — (1978).

II

This Court traditionally has been hesitant to overrule prior constructions of statutes or interpretations of common-law rules. "*Stare decisis* is usually the wise policy," *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting), but this cautionary principle must give way to countervailing considerations in appropriate circumstances.[4] I concur in the Court's view that this is not a case where we should "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States,* 328 U. S. 61, 70 (1946).

Nor is this the usual case in which the Court is asked to overrule a precedent. Here considerations of *stare decisis* cut in both directions. On the one hand, we have a series of rulings that municipalities and counties are not "persons" for purposes of § 1983. On the other hand, many decisions of this Court have been premised on the amenability of school boards and similar entities to § 1983 suits.

In *Monroe* and its progeny, we have answered a question that was never actually briefed or argued in this Court—whether a municipality is liable in damages for injuries that are the direct result of its official policies. "The theory of the complaint [in *Monroe* was] that under the circumstances [t]here alleged the City [was] liable for the acts of its police officers, by virtue of *respondeat superior*." Brief for Petitioners, O. T. 1960, No. 39, p. 21.[5] Respondents answered that adoption of petitioners' position would expose "Chicago and every other municipality in the United States . . . to Civil Rights liability through no action of its own and based on action contrary to its own ordinances and the laws of the state it is a part of [*sic*]." Brief for Respondents, *supra,* p. 26. Thus the ground of decision in *Monroe* was not advanced by either party and was broader than necessary to resolve the contentions made in that case.[6]

Similarly, in *Moor* v. *County of Alameda,* 411 U. S. 693 (1973), petitioners asserted that "the County was vicariously liable for the acts of its deputies and sheriff," *id.*, at 696, under 42 U. S. C. § 1988. In rejecting this vicarious-liability claim, *id.*, at 710, and n. 27, we reaffirmed *Monroe*'s reading of the statute, but there was no challenge in that case to "the holding in *Monroe* concerning the status under § 1983 of public entities such as the County," *id.*, at 700; Brief for Petitioners, O. T. 1972, No. 72–10, p. 9.

Only in *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973), did the Court confront a § 1983 claim based on conduct that was both authorized under state law and the direct cause of the claimed constitutional injury. In *Kenosha,* however, we raised the issue of the City's amenability to suit under § 1983 on our own initiative.[7]

This line of cases—from *Monroe* to *Kenosha*—is difficult to reconcile on a principled basis with a parallel series of cases in which the Court has assumed *sub silentio* that some local government entities could be sued under § 1983. If now, after full consideration of the question, we continued to adhere to *Monroe,* grave doubt would be cast upon the Court's exercise of § 1983 jurisdiction over school boards. See opinion of the Court, *ante,* at 3 n. 5. Since "the principle of blanket immunity established in *Monroe* cannot be cabined short of school boards," *ante,* at 36, the conflict is squarely presented. Although there was an independent basis of jurisdiction in many of the school board cases because of the inclusion of individual public officials as nominal parties, the opinions of this Court make explicit reference to the school board party, particularly in discussions of the relief to be awarded, see, *e. g., Green* v. *County School Board,* 391 U. S. 430, 437–439, 441–442 (1968); *Milliken* v. *Bradley,* 433 U. S. 267, 292–293 (1977) (Powell, J., concurring in the judgment). And, as the Court points out, *ante,* at 36–39, Congress has focused specifically on this Court's school board decisions in several statutes. Thus the exercise of § 1983 jurisdiction over school boards, while perhaps not premised on considered holdings, has been longstanding. Indeed, it predated *Monroe.*

Even if one attempts to explain away the school board decisions as involving suits which "may be maintained against board members in their official capacities for injunctive relief under either § 1983 or *Ex parte Young,* 209 U. S. 123 (1908)," dissenting opinion of Mr. Justice Rehnquist, *post,* at 3–4 n. 2, some difficulty remains in rationalizing the relevant body of precedents. At least two of the school board cases involved claims for monetary relief. *Cohen* v. *Chesterfield County School Board,* 326 F. Supp. 1159, 1161 (ED Va. 1971), rev'd,

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[4] See, *e. g., Continental TV, Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977); *Machinists* v. *Wisconsin Emp. Rel. Comm.*, 427 U. S. 132 (1976); *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973); *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971); *Boys Market* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407 n. 1 (1932) (Brandeis, J., dissenting).

[5] The District Court in Monroe ruled in the municipality's favor, stating: "since the liability of the City of Chicago is based on the doctrine of *respondeat superior*, and since I have already held that the complaint fails to state a claim for relief against the agents of the city, there is no claim for relief against the city itself." Record, O. T. 1960, No. 39, p. 30. The Court of Appeals affirmed for the same reason. 272 F. 2d 365–366 (CA7 1959).

Petitioners in this Court also offered an alternative argument that the city of Chicago was a "person" for purposes of § 1983, Brief for Petitioners, O. T. 1960, No. 39, p. 25, but the underlying theory of municipal liability remained one of *respondeat superior*.

[6] The docrine of *stare decisis* advances two important values of a rational system of law: (i) the certainty of legal principles and (ii) the wisdom of the conservative vision, that existing rules should be presumed rational and not subject to modification "at any time a new thought seems appealing," dissenting opinion of Mr. Justice Rehnquist, *post,* at 5; cf. O. Holmes, The Common Law 36 (1881). But, at the same time, the law has recognized the necessity of change, lest rules "simply persist . . . from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). Any overruling of prior precedent, whether of a constitutional decision or otherwise, disserves to some extent the value of certainty. But I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases. I also would recognize the fact that until this case the Court has not had to confront squarely the consequences of holding § 1983 inapplicable to official municipal policies.

Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. *Marbury* v. *Madison*, 1 Cranch 137 (1803), cited by the dissent, *post*, at 5, is a case in point. But the Court's recognition of its power to invalidate legislation not in conformity with constitutional command was essential to its judgment in *Marbury*. And on numerous subsequent occasions, the Court has been required to apply the full breadth of the *Marbury* holding. In *Monroe*, on the other hand, the Court's rationale was broader than necessary to meet the contentions of the parties and to decide the case in a principled manner. The language in *Monroe* cannot be dismissed as dicta, but we may take account of the fact that the Court simply was not confronted with the implications of holding § 1983 inapplicable to official municipal policies. It is an appreciation of those implications that has prompted today's re-examination of the legislative history of the 1871 measure.

[7] In *Aldinger* v. *Howard*, 427 U. S. 1 (1976), we reaffirmed *Monroe*, but petitioner did not contest the proposition that counties were excluded from the reach of § 1983 under *Monroe*, *id.*, at 16, and the question before us concerned the scope of pendent-party jurisdiction with respect to a state-law claim. Similarly, the parties in *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274 (1977), did not seek a re-examination of our ruling in *Monroe*.

474 F. 2d 395 (CA4 1973), rev'd, 414 U. S. 632 (1974); *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503, 504 (1969). See also *Vlandis* v. *Kline,* 412 U. S. 441, 445 (1973). Although the point was not squarely presented in this Court, these claims for damages could not have been maintained in official-capacity suits if the government entity were not itself suable. Cf. *Edelman* v. *Jordan,* 415 U. S. 651 (1974).[8] Moreover, the rationale of *Kenosha* would have to be disturbed, to avoid closing all avenues under § 1983 to injunctive relief against constitutional violations by local government. The Court of Appeals in this case suggested that we import, by analogy, the Eleventh Amendment fiction of *Ex parte Young* into § 1983. 532 F. 2d 259, 264–266 (CA2 1976). That approach, however, would create tension with *Kenosha* because it would require "a bifurcated application" of "the generic word 'person' in § 1983" to public officials "depending on the nature of the relief sought against them." 412 U. S., at 513. A public official sued in his official capacity for carrying out official policy would be a "person" for purposes of injunctive relief, but a non-"person" in an action for damages. The Court's holding avoids this difficulty. See *ante,* at 30 n. 55.

Finally, if we continued to adhere to a rule of absolute municipal immunity under § 1983, we could not long avoid the question whether "we should, by analogy to our decision in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983 . . . ." *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 278 (1977). One aspect of that inquiry would be whether there are any "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens, supra,* at 396, such as an "explicit congressional declaration that persons injured by a [municipality] may not recover money damages . . . , but must instead be remitted to another remedy, equally effective in the view of Congress," *id.,* at 397. In light of the Court's persuasive re-examination in today's decision of the 1871 debates, I would have difficulty inferring from § 1983 "an explicit congressional declaration" against municipal liability for the implementation of official policies in violation of the Constitution. Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today.[9]

III

Difficult questions nevertheless remain for another day. There are substantial line-drawing problems in determining "when execution of a government's policy or custom" can be said to inflict constitutional injury such that "government as an entity is responsible under § 1983." Opinion for the Court, *ante,* at 34. This case, however, involves formal, written policies of a municipal department and school board; it is the clear case. The Court also reserves decision on the availability of a qualified municipal immunity. *Ante,* at 41. Initial resolution of the question whether the protection available at common law for municipal corporations, see dissenting opinion of MR. JUSTICE REHNQUIST, *post,* at 7–8, or other principles support a qualified municipal immunity in the context of the § 1983 damages action, is left to the lower federal courts.

MR. JUSTICE STEVENS, concurring in part.

Since Parts II and IV of the opinion of the Court are merely advisory and are not necessary to explain the Court's decision, I join only Parts I, III, and V.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Seventeen years ago, in *Monroe* v. *Pape,* 365 U. S. 167 (1961), this Court held that the 42d Congress did not intend to subject a municipal corporation to liability as a "person" within the meaning of 42 U. S. C. § 1983. Since then, the Congress has remained silent, but this Court has reaffirmed that holding on at least three separate occasions. *Aldinger* v. *Howard,* 427 U. S. 1 (1976); *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973); *Moor* v. *County of Alameda,* 411 U. S. 693 (1973). See also *Mt. Healthy City School Dist.* v. *Doyle,* 429 U. S. 274, 277–279 (1977). Today, the Court abandons this long and consistent line of precedents, offering in justification only an elaborate canvass of the same legislative history which was before the Court in 1961. Because I cannot agree that this Court is "free to disregard these precedents," which have been "considered maturely and recently" by this Court, *Runyon* v. *McCrary,* 426 U. S. 160, 186 (1976) (POWELL, J., concurring), I am compelled to dissent.

I

As this Court has repeatedly recognized, *Runyon, supra,* at 175 n. 12; *Edelman* v. *Jordan,* 415 U. S. 651, 671 n. 14 (1974), considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this Court's settled construction of the law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit. The controlling principles were best stated by Mr. Justice Brandeis:

> "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406–407 (1932) (dissenting opinion) (footnotes omitted).

Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedents. The best exposition of the proper burden of persuasion was delivered by Mr. Justice Harlan in *Monroe* itself:

> "From my point of view, the policy of *stare decisis,* as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation, require

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[8] To the extent that the complaints in those cases asserted claims against the individual defendants in their personal capacity, as well as official capacity, the Court would have had authority to award the relief requested. There is no suggestion in the opinions, however, that the practices at issue were anything other than official, duly authorized policies.

[9] MR. JUSTICE REHNQUIST's dissent makes a strong argument that "[s]ince *Monroe,* municipalities *have* had the right to expect that they would not be liable retroactively for their officers' failure to predict this Court's recognition of new constitutional rights." *Post,* at 4. But it reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting and retaining competent officers, board members and employees. In any event, the possibility of a qualified immunity, as to which the Court reserves decision, may remove some of the harshness of liability for good-faith failure to predict the often uncertain course of constitutional adjudication.

> that it appear *beyond doubt* from the legislative history of the 1871 statute that *Classic* [v. *United States*, 313 U. S. 299 (1941)] and *Screws* [v. *United States*, 325 U. S. 91 (1945)] misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified." *Monroe, supra*, at 192 (concurring opinion) (footnote omitted) (emphasis added).

The Court does not demonstrate that any exception to this general rule is properly applicable here. The Court's first assertion, that *Monroe* "was a departure from prior practice," *ante*, at 35, is patently erroneous. Neither in *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), nor in *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955), nor in any of the school board cases cited by the Court, *ante*, at 3–4, n. 5, was the question now before us raised by any of the litigants or addressed by this Court. As recently as four Terms ago, we said in *Hagans* v. *Lavine*, 415 U. S. 528 (1974):

> "Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when the case finally brings the jurisdictional issue before us." *Id.*, at 535 n. 5.

The source of this doctrine that jurisdictional issues decided *sub silentio* are not binding in other cases seems to be Chief Justice Marshall's remark in *United States* v. *More*, 3 Cranch 159, 172 (1805).[1] While the Chief Justice also said that such decisions may "have much weight, as they show that this point neither occurred to the bar or the bench," *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 88 (1809), unconsidered assumptions of jurisdiction simply cannot outweigh four consistent decisions of this Court, explicitly considering and rejecting that jurisdiction.

Nor is there any indication that any later Congress has ever approved suit against any municipal corporation under § 1983. Of all its recent enactments, only the Civil Rights Attorneys' Fees Act, Pub. L. 94–559, § 2, 90 Stat. 2641 (1976), codified at 42 U. S. C. § 1988, explicitly deals with the Civil Rights Act of 1871.[2] The Act provides that attorneys' fees may be awarded to the prevailing party "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title." There is plainly no language in the 1976 Act which would enlarge the parties suable under those substantive sections; it simply provides that parties who are already suable may be made liable for attorneys' fees. As the Court admits, *ante*, at 39, the language in the Senate report stating that liability may be imposed "whether or not the agency or government is named as a party," S. Rep. No. 94–1101, at 5, suggests that Congress did not view its purpose as being in any way inconsistent with the well-known holding of *Monroe*.

The Court's assertion that municipalities have no right to act "on an assumption that they can violate constitutional rights indefinitely," *ante*, at 40, is simply beside the point. Since *Monroe*, municipalities *have* had the right to expect that they would not be held liable retroactively for their officers failure to predict this Court's recognition of new constitutional rights. No doubt innumerable municipal insurance policies and indemnity ordinances have been founded on this assumption, which is wholly justifiable under established principles of *stare decisis*. To obliterate those legitimate expectations without more compelling justification than those advanced by the Court is a significant departure from our prior practice.

I cannot agree with Mr. Justice Powell's view that "[w]e owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Ante*, at 6 n. 6 (Powell, J., concurring). Private parties must be able to rely upon explicitly stated holdings of this Court, without being obliged to peruse the briefs of the litigants to predict the likelihood that this Court might change its mind. To cast such doubt upon each of our cases, from *Marbury* v. *Madison*, 1 Cranch 137 (1803), forward, in which the explicit ground of decision "was never actually briefed or argued," *ante*, at 5 (Powell, J., concurring), would introduce intolerable uncertainty into the law. Indeed, in *Marbury* itself, the argument of Charles Lee on behalf of the applicants—which, unlike the arguments in *Monroe*, is reproduced in the Reports of this Court where anyone can see it—devotes not a word to the question of whether this Court has the power to invalidate a statute duly enacted by the Congress. Neither this ground of decision nor any other was advanced by Secretary of State Madison, who evidently made no appearance. 1 Cranch, at 153–154. More recent landmark decisions of this Court would appear to be likewise vulnerable under my Brother Powell's analysis. In *Mapp* v. *Ohio*, 367 U. S. 643 (1961), none of the parties requested the Court to overrule *Wolf* v. *Colorado*, 335 U. S. 25 (1949); it did so only at the request of an *amicus curiae*. 367 U. S., at 646 n. 3. That *Marbury*, *Mapp*, and countless other decisions retain their vitality despite their obvious flaws is a necessary byproduct of the adversary system, in which both judges and the general public rely upon litigants to present "all the relevant considerations." *Ante*, at 6 n. 6 (Powell, J., concurring). While it undoubtedly has more latitude in the field of constitutional interpretation, this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing.[3]

Thus, our only task is to discern the intent of the 42d Congress. That intent was first expounded in *Monroe*, and it has been followed consistently ever since. This is not some esoteric branch of the law in which congressional silence might reasonably be equated with congressional indifference. Indeed, this very year, the Senate has been holding hearings on a bill, S. 35, 95th Cong., 1st Sess. (1977), which would remove the municipal immunity recognized by *Monroe*. 124 Cong. Rec. D117 (daily ed. Feb. 8, 1978). In these circumstances, it cannot be disputed that established principles of *stare decisis* require this Court to pay the highest degree of deference to its prior holdings. *Monroe* may not be overruled unless it has been demonstrated "beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the controlling provision." *Monroe, supra*, at 192 (Harlan, J., concurring). The Court must show not only that

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[1] As we pointed out in *Mt. Healthy*, the existence of a claim for relief under § 1983 is "jurisdictional" for purposes of invoking 28 U. S. C. § 1343, even though the existence of a meritorious constitutional claim is not similarly required in order to invoke jurisdiction under 28 U. S. C. § 1331. See *Bell* v. *Hood*, 327 U. S. 678, 682 (1946); *Mt. Healthy, supra*, at 278–279.

[2] The other statutes cited by the Court, at 37–39, n. 63 make no mention of § 1983, but refer generally to suits against "a local educational agency." As noted by the Court of Appeals, 532 F. 2d 259, 264–266, such suits may be maintained against board members in their official capacities for injunctive relief under either § 1983 or *Ex parte Young*, 209 U. S. 123 (1908). Congress did not stop to consider the technically proper avenue of relief, but merely responded to the fact that relief was being granted. The practical result of choosing the avenue suggested by petitioners would be the subjection of school corporations to liability in damages. Nothing in recent congressional history even remotely supports such a result.

[3] I find it somewhat ironic that, in abandoning the supposedly ill-considered holding of *Monroe*, my Brother Powell relies heavily upon cases involving school boards, although he admits that "the exercise of § 1983 jurisdiction . . . [was] perhaps not premised on considered holdings." *Ante*, at 8 (Powell, J., concurring).

Congress, in rejecting the Sherman Amendment, concluded that municipal liability was not unconstitutional, but also that, in enacting § 1, it intended to impose that liability. I am satisfied that no such showing has been made.

II

Any analysis of the meaning of the word "person" in § 1983, which was originally enacted as § 1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, must begin, not with the Sherman Amendment, but with the Dictionary Act. The latter Act, which supplied rules of construction for all legislation, provided:

> "That in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense . . . ." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

The Act expressly provided that corporations need not be included within the scope of the word "person" where the context suggests a more limited reach. Not a word in the legislative history of the Act gives any indication of the contexts in which Congress felt it appropriate to include a corporation as a person. Indeed, the chief cause of concern was that the Act's provision that "words importing the masculine gender may be applied to females," might lead to an inadvertent extension of the suffrage to women. Cong. Globe, 41st Cong., 3d Sess., 777 (remarks of Sen. Sawyer).

There are other factors, however, which suggest that the Congress which enacted § 1983 may well have intended the word "person" "to be used in a more limited sense," as *Monroe* concluded. It is true that this Court had held that both commercial corporations, *Louisville R. Co.* v. *Letson*, 2. How. 497, 558 (1844), and municipal corporations, *Cowles* v. *Mercer County*, 7 Wall. 118, 121 (1869), were "citizens" of a State within the meaning of the jurisdictional provisions of Art. III. Congress, however, also knew that this label did not apply in all contexts, since this Court, in *Paul* v. *Virginia*, 8 Wall. 168 (1868), had held commercial corporations not to be "citizens" within the meaning of the Privileges and Immunities Clause, U. S. Const., Art. IV, § 2. Thus, the Congress surely knew that, for constitutional purposes, corporations generally enjoyed a different status in different contexts. Indeed, it may be presumed that Congress intended that a corporation should enjoy the same status under the Ku Klux Act as it did under the Fourteenth Amendment, since it had been assured that § 1 "was so very simple and really reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (remarks of Sen. Edmunds). At the time § 1983 was enacted the only federal case to consider the status of corporations under the Fourteenth Amendment had concluded, with impeccable logic, that a corporation was neither a "citizen" nor a "person." *Insurance Co.* v. *New Orleans*, 13 F. Cas. 67 (C. C. D. La. 1870) (No. 7,052).

Furthermore, the state courts did not speak with a single voice with regard to the tort liability of municipal corporations. Although many Members of Congress represented States which had retained absolute municipal tort immunity, see, *e. g., Irvine* v. *Town of Greenwood*, 89 S. C. 511, 72 S. E. 228 (1911) (collecting earlier cases), other States had adopted the currently predominant distinction imposing liability for proprietary acts, see generally 2 F. Harper & F. James, The Law of Torts § 29.6 (1956), as early as 1842, *Bailey* v. *City of New York*, 3 Hill 531 (N. Y. 1842). Nevertheless, no state court had ever held that municipal corporations were always

The general remarks from the floor on the liberal purposes of § 1 offer no explicit guidance as to the parties against whom the remedy could be enforced. As the Court concedes, only Representative Bingham raised a concern which could be satisfied only by relief against governmental bodies. Yet he never directly related this concern to § 1 of the Act. Indeed, Bingham stated at the outset, "I do not propose now to discuss the provisions of the bill in detail," Cong. Globe, 42d Cong., 1st Sess., App. 82, and, true to his word, he launched into an extended discourse on the beneficent purposes of the Fourteenth Amendment. While Bingham clearly stated that Congress could "provide that no citizen in any State should be deprived of his property by State law or the judgment of a State court without just compensation therefor," *id.*, at 85, he never suggested that such a power was exercised in § 1.[4] Finally, while Bingham has often been advanced as the chief expositor of the Fourteenth Amendment, *Duncan* v. *Louisiana*, 391 U. S. 145, 165 (1968) (Black, J., concurring); *Adamson* v. *California*, 332 U. S. 46, 73–74 (1947) (Black, J., dissenting), there is nothing to indicate that his colleagues placed any greater credence in his theories than has this Court. See *Duncan, supra,* at 174–176 (Harlan, J., dissenting); *Adamson, supra,* at 64 (Frankfurter, J., concurring).

Thus, it ought not lightly to be presumed, as the Court does today, *ante*, at 30 n. 53, that § 1983 "should prima facie be construed to include 'bodies politic' among the entities that could be sued." Neither the Dictionary Act, the ambivalent state of judicial decisions, nor the floor debate on § 1 of the Act give any indication that any Member of Congress had any inkling that § 1 could be used to impose liability on municipalities. Although Senator Thurman, as the Court emphasizes, *ante*, at 26 n. 45, expressed his belief that the terms of § 1 "are as comprehensive as can be used," Cong. Globe, 42d Cong., 1st Sess., App., 217, an examination of his lengthy remarks demonstrates that it never occurred to him that § 1 did impose or could have imposed any liability upon municipal corporations. In an extended parade of horribles, this "old Roman," who was one of the Act's most implacable opponents, suggested that state legislatures, Members of Congress, and state judges might be held liable under the Act. *Ibid.* If, at that point in the debate, he had any idea that § 1 was designed to impose tort liability upon cities and counties, he would surely have raised an additional outraged objection. Only once was that possibility placed squarely before the Congress—in its consideration of the Sherman Amendment—and the Congress squarely rejected it.

The Court is probably correct that the rejection of the Sherman Amendment does not lead ineluctably to the conclusion that Congress intended municipalities to be immune from liability under all circumstances. Nevertheless, it cannot be denied that the debate on that Amendment, the only explicit consideration of municipal tort liability, sheds considerable light on the Congress' understanding of the status of municipal corporations in that context. Opponents of the Amendment were well aware that municipalities had been subjected to the jurisdiction of the federal courts in the context of suits to enforce their contracts, Cong. Globe, 42d Cong., 1st Sess., 789 (remarks of Rep. Kerr), but they expressed their skepticism that such jurisdiction should be exercised in cases sounding in tort:

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[4] It has not been generally thought, before today, that § 1983 provided an avenue of relief from unconstitutional takings. Those federal courts which have granted compensation against state and local governments have resorted to an implied right of action under the Fifth and Fourteenth Amendments. *Richmond Elks Hall Assn.* v. *Richmond Redevelopment Agency*, 561 F. 2d 1327 (CA9 1977), aff'g 389 F. Supp. 486 (ND Cal. 1975); *Foster* v. *City of Detroit*, 405 F. 2d 138, 140 (CA6 1968). Since the Court today abandons the holding of *Monroe* chiefly on the strength of Bingham's arguments, it is indeed anomalous that § 1983 will provide relief only when a local government, not the State itself, seizes private property. See *ante*, at 30 n. 54; *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 452

> "Suppose a judgment obtained under this section, and no property can be found to levy upon except the court-house, can we levy on the court-house and sell it? So this section provides, and that too in an action of tort, in an action *ex delicto,* where the county has never entered into any contract, where the State has never authorized the county to assume any liability of the sort, or imposed any liability upon it. It is in my opinion simply absurd." *Id.,* at 799 (remarks of Rep. Farnsworth).

Whatever the merits of the constitutional arguments raised against it, the fact remains that Congress rejected the concept of municipal tort liability on the only occasion in which the question was explicitly presented. Admittedly this fact is not conclusive as to whether Congress intended § 1 to embrace a municipal corporation within the meaning of "person," and thus the reasoning of *Monroe* on this point is subject to challenge. The meaning of § 1 of the Act of 1871 has been subjected in this case to a more searching and careful analysis than it was in *Monroe,* and it may well be that on the basis of this closer analysis of the legislative debates a conclusion contrary to the *Monroe* holding could have been reached when that case was decided 17 years ago. But the rejection of the Sherman Amendment remains instructive in that here alone did the legislative debates squarely focus on the liability of municipal corporations, and that liability was rejected. Any inference which might be drawn from the Dictionary Act or from general expressions of benevolence in the debate on § 1 that the word "person" was intended to include municipal corporations falls far short of showing "beyond doubt" that this Court in *Monroe* "misapprehended the meaning of the controlling provision." Errors such as the Court may have fallen into in *Monroe* do not end the inquiry as to *stare decisis;* they merely begin it. I would adhere to the holding of *Monroe* as to the liability of a municipal corporation § 1983.

III

The decision in *Monroe* v. *Pape,* was the fountainhead of the torrent of civil rights litigation of the last 17 years. Using § 1983 as a vehicle, the courts have articulated new and previously unforseeable interpretations of the Fourteenth Amendments. At the same time, the doctrine of municipal immunity enunciated in *Monroe* has protected municipalities and their limited treasuries from the consequences of their officials' failure to predict the course of this Court's constitutional jurisprudence. None of the Members of this Court can foresee the practical consequences of today's removal of that protection. Only the Congress, which has the benefit of the advice of every segment of this diverse Nation, is equipped to consider the results of such a drastic change in the law. It seems all but inevitable that it will find it necessary to do so after today's decision.

I would affirm the judgment of the Court of Appeals.

OSCAR CHASE, Brooklyn, N. Y. (NANCY STEARNS, GREGORY ABBEY, JACK GREENBERG, and ERIC SCHNAPPER, with him on the brief) for petitioners; L. KEVIN SHERIDAN, Assistant Corporation Counsel, State of New York (W. BERNARD RICHLAND, Corporation Counsel, with him on the brief) for respondents.

Nos. 77-452, 77-457, 77-551, AND 77-602

Trans Alaska Pipeline Rate Cases.
On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 6, 1978]

Syllabus

Anticipating completion of the Trans Alaska Pipeline (TAPS) in mid-1977, seven of its eight owners filed tariffs for the transportation of oil over TAPS with the Interstate Commerce Commission, which at that time had jurisdiction over oil pipelines. Four protestants, respondents here, immediately asked the ICC to suspend the proposed rates, which were claimed to be prima facie unlawful for a number of reasons. Rejecting the carriers' argument that it had no authority under § 15 (7) of the Interstate Commerce Act (Act) (which provides that "[w]henever there shall be filed . . . any schedule stating a new individual or joint rate, . . . the Commission . . . may . . . suspend the operation of such schedule") to suspend TAPS' initial rates, the ICC concluded that the rates should be suspended. It then went on to hold that the TAPS carriers could submit interim tariffs, to be effective on one day's notice, which would be allowed to go into effect during the suspension period if the rates proposed in such tariffs were lower than levels summarily fixed by the ICC and if the TAPS carriers would agree to refund any amounts collected under either the interim or initially proposed tariffs which might subsequently (after full hearing) be held to be unlawful. The TAPS carriers petitioned for review of the ICC's order in the Court of Appeals, which affirmed all aspects of the order. *Held:*

1. Pursuant to § 15 (7), the ICC is authorized to suspend initial tariff schedules of an interstate carrier subject to Title I of the Act, as it did here. As against the contention that the word "new" as used in § 15 (7) was intended to refer only to increased or changed rates (*i. e.,* rates which replace other rates previously in effect), such word must be given its literal interpretation as applying to services which have never before been offered to the public, thus embracing the initial rates in question in these cases.

2. The ICC has power ancillary to its suspension authority under § 15 (7) to establish, without an adjudicatory hearing, maximum interim rates which it would allow to go into effect during the suspension period. By so establishing such interim rates here, the ICC did not exceed its suspension power but, to the contrary, performed an intelligent and practical exercise of its suspension power in accord with Congress' goal in § 15 (7) to strike a fair balance between the needs of the public and the needs of regulated carriers.

3. The ICC, as part of such ancillary power to establish maximum interim rates, has authority, which it properly exercised here, to condition its decision not to suspend tariffs on a requirement that the carriers refund any amounts collected under either interim or initially proposed rates that might later be determined to exceed lawful rates, notwithstanding the absence of express authority in the statute for such refunds. *United States* v. *Chesapeake & Ohio R. Co.,* 426 U. S. 500. If the ICC's approximations of what would be lawful rates are to be used to meet the carriers' needs, such refund provisions are a necessary and "directly related," *id*, at 514, means of discharging the ICC's mandate to protect the public pending a more complete determination of the reasonableness of the rates, and thus are a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," *ibid.,* in that they allow the ICC, in exercising its suspension power, to pursue "a more measured course" and to "offe[r] an alternative tailored far more precisely to the particular circumstances" of these cases. *Ibid.*

557 F. 2d 775, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which all Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The primary question presented in these cases is whether the Interstate Commerce Commission is authorized by § 15 (7) of the Interstate Commerce Act, as added, 36 Stat. 552, as amended, 49 U. S. C. § 15 (7),[1] to suspend *initial* tariff schedules of an interstate carrier subject to Part I of the Act, 24 Stat. 379, as amended, 49 U. S. C. §§ 1–27 (1970 ed., and Supp. V). In addition, we are asked to decide whether, if the Commission is so authorized, it has additional authority summarily to fix maximum interim tariff rates which will be allowed to go into effect during the suspension period and to require carriers filing tariffs containing such rates, as a further condition of nonsuspension, to refund any amounts collected which are ultimately found to be unlawful. We hold that the Commission has statutory authority to suspend initial tariff schedules and that it has power ancillary to that authority to establish maximum interim rates and associated regulations—including refund provisions—as it has done in these cases.

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[1] "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, . . . the Commission

I

In 1968, massive reservoirs of oil were discovered at Prudhoe Bay in the Alaskan arctic. Two years later plans crystallized to build a pipeline from Prudhoe Bay to the all-weather port of Valdez on Alaska's Pacific Coast. After protracted environmental litigation was ended by special Act of Congress,[2] construction of the Trans Alaska Pipeline System (TAPS) began in 1974. In May and June 1977, seven of the eight owners of TAPS,[3] anticipating completion of TAPS in mid-1977, filed tariffs with the Interstate Commerce Commission[4] setting out the rules and rates governing transportation of oil over TAPS. These rates were met immediately by formal protests[5] from the State of Alaska,[6] the Arctic Slope Regional Corporation,[7] the United States Department of Justice,[8] and the Commission's Bureau of Investigations and Enforcement.[9]

Acting pursuant to § 15 (7) of the Interstate Commerce Act, the Commission[10] found that the protests lodged against the TAPS tariffs gave it "reason to believe the proposed rates are not just and reasonable." *Trans Alaska Pipeline System*, 355 I. C. C. 80, 81 (1977) (*TAPS*). In support of this conclusion, it cited the protestants' arguments that the filed rates allowed excessive returns on capital[11] and that the cost data provided by the carriers was overstated.[12] Dismissing the TAPS carriers' argument that § 15 (7) gave the Commission no power to suspend initial rates, the Commission suspended the TAPS rates for the full seven months allowed by law, see *id.*, at 81–82, citing protestants' showing of "probable unlawfulness," *id.*, at 81, and the Commission's concern that "maintenance of excessively high rates could act as a deterrent or an obstacle to the use of the pipeline by nonaffiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the well-head price of the oil." *Id.*, at 82.

On the other hand, the Commission found that it would not be in the public interest if TAPS had to close for a seven-month period. *Id.*, at 83. Accordingly, "accept[ing] the basic data supplied by the carriers" as true, *ibid.*, the Commission applied what it stated to be its traditional rate-of-return calculation[13] to compute new rates that approximated what full investigation would likely reveal to be lawful rates[14] and

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shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge . . . ; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge . . . , but not for a longer period than seven months beyond the time when it would otherwise go into effect . . . ."

[2] Trans-Alaska Pipeline Authorization Act, 87 Stat. 584, 43 U. S. C. § 1651 *et seq.* (1970 ed., Supp. V).

[3] Each of eight companies holds an undivided interest in TAPS and each has the "right and obligation to use its share of TAPS capacity as an independent common carrier." Brief for Petitioners 5. The interests held by each owner are as follows:

Sohio Pipe Line Co.	33.34%
ARCO Pipe Line Co.	21.00
Exxon Pipeline Co.	20.00
BP Pipelines, Inc.	15.84
Mobil Alaska Pipeline Co.	5.00
Phillips Alaska Pipeline Corp.	1.66
Union Alaska Pipeline Co.	1.66
Amerada Hess Pipeline Corp.	1.50

Trans Alaska Pipeline System, 350 I. C. C. 80, 91–93 (1977) (*TAPS*). Phillips Alaska Pipeline Corp. filed its tariffs later than the other seven carriers and has filed a petition for review of the suspension of its tariffs in the Court of Appeals for the District of Columbia Circuit, where decision has been deferred pending decision by this Court in these cases. See Brief for Petitioners 4 n. 2.

[4] Oil pipelines were until October 1, 1977 subject to the jurisdiction of the Interstate Commerce Commission. See 49 U. S. C. § 1 (1)(b). On that date, jurisdiction over the transportation of oil in interstate commerce by pipeline was transferred from the Interstate Commerce Commission to the Federal Energy Regulatory Commission (FERC). Department of Energy Organization Act of 1977, 91 Stat. 565; Executive Order 12009, 42 Fed. Reg. 46267 (1977). Further proceedings on the TAPS tariffs are proceeding before FERC.

[5] See 49 CFR § 1100.42 (1975).

[6] The State of Alaska owns a one-eighth royalty interest in Prudhoe Bay oil, which is calculated to be equal to 12.5% of the "wellhead value" of that oil. The parties tell us (although recent reports of falling oil prices on the West Coast tend to cast doubt on this) that the market price of oil is essentially fixed. Accordingly, wellhead value is approximately determined by subtracting transportation costs from the fixed market price. See I App. 554a. For this reason, the State claims to lose 23 cents in royalties for every dollar by which the TAPS rate exceeds a just and reasonable level. Brief for Alaska Respondents 7.

[7] The Corporation, one of 13 established pursuant to the Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U. S. C. §§ 1601–1627 (1970 ed., Supp. V), represents the interests of the Inupiat Eskimos, who have a claim to be paid 2% of the wellhead value, see *supra*, n. 6, of Alaskan crude oil up to a total of $500 million as consideration for their surrender of aboriginal land claims in the Prudhoe Bay area. The rate at which the Corporation collects revenue is inversely proportional to the TAPS rate. See *ibid.* Accordingly, if the TAPS rate is too high, the Corporation, which has a great immediate need for oil royalties, is harmed.

[8] The Department of Justice argued that the proposed TAPS rates were unreasonably high and would accordingly "discourage exploration and development of new fields by reducing the wellhead value of crude [oil]." I App. 95a. Such discouragement was said to be "inconsistent with national energy policy." *Ibid.*

[9] The Bureau argued that the proposed rates were "prima facie unreasonable," I App. 143a, and should be suspended pending a full investigation.

[10] Rather than referring the TAPS protest to its staff suspension board and its appellate division of three Commissioners, as is routinely done in suspension cases, see 49 CFR § 1100.200 (1975), the Commission itself heard oral argument on the protests and determined that the TAPS rates should be suspended.

[11] According to carrier data, the aggregate debt-equity ratio in TAPS financing was approximately 85%–15%. I App. 23a–24a, 159a; *TAPS*, 350 I. C. C., at 91. In calculating their rates, the carriers deducted interest expense in the computation of net income and then added a return element to calculated net income sufficient to provide them a 7% return on *total* investment, *i. e.*, both debt and equity. III App. 177–178. The protestants characterized this as "double-dipping." Brief of Alaska Respondents 13. The carriers defended the practice as being consistent with Commission practice and a consent decree entered in *United States* v. *Atlantic Refining Co.*, C. A. No. 14060 (DC 1941). See, *e. g.*, I App. 349a–355a; III App. 178.

[12] TAPS was originally estimated to cost less than $1 billion. I App. 10a. However, the estimated cost on which tariffs were calculated by the TAPS carriers was over $9 billion. I App. 102a, 117a. Protestants argued that much of the $9 billion represented waste and mismanagement on the part of the TAPS owners and could not, therefore, be included in the TAPS rate base. *E. g.*, I App. 10a–11a.

[13] Usually, the Commission uses an 8% return on valuation in setting pipeline rates, but in recognition of the extreme risk of the TAPS venture, the Commission used 10% in setting the interim rates. See *TAPS*, 355 I. C. C., at 85.

it stated that it would not suspend interim tariffs which specified rates no higher than those estimated. See *id.*, at 83–86. However, since the estimated rates might still "exceed reasonable levels," the Commission stated that any interim tariffs must provide for refunds of any amounts later determined to be in excess of lawful rates. *Id.*, at 86.[15]

Four pipeline owners, petitioners here,[16] filed a petition for review of the Commission's suspension order in the Court of Appeals for the Fifth Circuit. That court determined: (1) that the Commission had the statutory authority to suspend an initial tariff as well as changes in tariffs; (2) that it had authority ancillary to the suspension power to set out, without an adjudicatory hearing, maximum interim rates which it would allow to go into effect during the suspension period; and (3) that it had authority to condition a decision not to suspend tariffs on a requirement that carriers whose tariffs were allowed to go into effect be prepared to make refunds of any amounts collected—whether under initially proposed or interim tariffs—which were later determined (after full hearing) to be unlawful. *Mobil Alaska Pipeline Co.* v. *United States*, 557 F. 2d 775 (1977).

Petitioners sought review in this Court and filed applications for a stay of the Commission's suspension order, all relief having been denied by the Fifth Circuit. On October 20, 1977, we granted the applications for a stay, and we issued a supplemental stay order on November 14, 1977. 434 U. S. 913; 434 U. S. 949. Thereafter we granted certiorari to consider the three issues decided by the Court of Appeals. 434 U. S. 964. We affirm.[17]

II

By the Act of Sept. 18, 1940, ch. 722, Tit. I, § 1, 54 Stat. 899, 49 U. S. C. preceding § 1, Congress declared the National Transportation Policy of the United States to be "to encourage the establishment and maintenance of reasonable charges for transportation services." Part I of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. §§ 1–27 (1970 ed., and Supp. V), which applies to common carriers by rail and pipeline, is one vehicle by which the National Transportation Policy is carried into effect. Under the Act as passed in 1887, however, the role of the Commission in establishing "reasonable charges" was circumscribed. Although § 1 of the Act provided that "[a]ll charges made for any service rendered or to be rendered in the transportation of passengers or property . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful," 24 Stat. 379, this Court early held that the Commission had no authority to set charges, but could only determine if charges set by the carriers were unreasonable or unjust in the context of granting reparations to injured shippers. See *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479 (1897); 1 I. Sharfman, The Interstate Commerce Commission 25–27 (1931).

In 1906, Congress passed the Hepburn Act, 34 Stat. 584, which, *inter alia*, augmented the Commission's authority to condemn existing rates as unjust or unreasonable by adding express authority to set maximum rates to be observed by carriers in the future. See 49 U. S. C. § 15. Under the Hepburn Act, however, the Commission could not issue an order affecting a rate until it had become effective. This feature of the Hepburn Act was immediately recognized by the Commission as a major defect. See 1 Sharfman 51 n. 50. It meant that the only relief against unreasonable rates lay in the reparations remedy and this could not provide a satisfactory solution:

> "In many cases the damage suffered through loss of competitive advantage far exceeds the difference between the rate actually charged and that found to be reasonable by the Commission; and in most instances the burden of the unreasonable rate is borne by a prior producer or is shifted to the ultimate consumer, for whom no redress whatever is available as against the carrier." *Id.*, at 51.

See H. R. Rep. No. 923, 61st Cong., 2d Sess., p. 4 (1910), quoting President Taft's special message to Congress on the Interstate Commerce Act;[18] S. Rep. No. 355, 61st Cong., 2d Sess., p. 8 (1910);[19] *United States* v. *Chesapeake & Ohio R. Co.*, 426 U. S. 500, 513, and n. 10 (1976) (*Chessie*); Dixon,

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[14] The rates initially filed and the maximum interim rates allowed by the ICC are as follows:

Carrier	Proposed Rate	Interim Rate	Reduction
Amerada Hess	$6.44	$4.85	$1.59
BP	6.35	4.68	1.67
Mobil Alaska	6.31	4.84	1.47
Exxon	6.27	5.10	1.17
Phillips Alaska	6.22	4.83	1.39
Sohio	6.16	4.70	1.46
Union Alaska	6.09	4.89	1.20
ARCO	6.04	4.91	1.13

See *id.*, at 80, 87, 94.

[15] In addition, the Commission authorized the carriers to file new tariffs which could become effective on as little as one-day's notice and it instituted a formal adjudicatory investigation into the lawfulness of the suspended rates pursuant to 49 U. S. C. § 15 (1). *TAPS*, 355 I. C. C., at 87–88.

[16] Sohio Pipeline Co., Union Alaska Pipeline Co., and Amerada Hess Pipeline Corp. were intervenors in the proceedings below and are parties here. See this Court's Rule 21.

[17] In the Court of Appeals, the United States argued that *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), and *United States* v. *SCRAP*, 412 U. S. 669 (1973), divest courts of jurisdiction to review suspension orders of the Interstate Commerce Commission. In this Court, the United States has modified that position and now apparently concedes that courts have jurisdiction to review suspension orders to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority. We agree.

Arrow and *SCRAP* stand for two propositions: first, that federal courts have no power to enjoin rate changes before the Commission has finally determined the lawfulness of rates, see *Arrow*, *supra*, at 669; *SCRAP*, *supra*, at 691; and, second, that federal courts have no power to make "an independent appraisal of the reasonableness of rates." *Arrow*, *supra*, at 670–671; see *SCRAP*, *supra*, at 692. Although reversal of a suspension order on judicial review might have the effect of allowing a rate to go into effect, such a reversal would not have the effect of an injunction, which jeopardizes "the regulatory goal of uniformity" of rates, *Arrow*, *supra*, at 664; see *infra*, at 9, since the effect of the reviewing court's judgment would be to void the suspension order as to all affected carriers in all regions of the country. Moreover, under the recently modified provisions for judicial review of ICC orders, only one reviewing court could have jurisdiction over a suspension order. See 28 U. S. C. §§ 2341 (3)(a), 2342 (5) (1970 ed., Supp. V), added by Pub. L. No. 93–584, §§ 3–4, 88 Stat. 1917; 28 U. S. C. § 2349 (a). And, although we reaffirm our previous holding that courts may not independently appraise the reasonableness of rates, no such appraisal is involved in inquirying whether the Commission has overstepped the bounds of its authority. Therefore, we conclude that Congress did not mean to cut off judicial review for such limited purposes. Cf. *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967); *Leedom* v. *Kyne*, 358 U. S. 184, 190 (1958).

[18] "'It may be doubted how effective [the reparations] remedy really is. Experience has shown that many, perhaps most, shippers do not resort to proceedings to recover the excessive rates which they may have been required to pay, for the simple reason that they have added the rates paid to the cost of the goods and thus enhanced the price thereof to their customers, and that the public has in effect paid the bill.'"

[19] "[I]n practice it is found that . . . restitution is but seldom sought or awarded; probably because the shipper generally recoups himself from the public for the amount of the loss through the augmented price of the commodity."

The Mann-Elkins Act, 24 Q. J. Econ. 593, 602–603 (1910). The Commission's Annual Reports also tell us that, as early as 1907, private litigants were able to convince some federal courts to enjoin rate advances after their effective dates but before the Commission was able to complete an investigation as required by the Hepburn Act. See *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U. S. 658, 663–664, and 663 n. 6 (1963); 1 Sharfman 50 n. 49. Thus, not only did the Hepburn Act fail to protect the public against unreasonable carrier charges, but the equity litigation spawned by the Act led to discrimination in rates—much like that prohibited by § 1 of the Act—in the situation in which carriers successful in court would be paying one charge while those who were unsuccessful, or who did not have the wherewithal to go to court or to pay an injunction bond, were paying higher charges. See *Arrow, supra,* at 663–664; 1 Sharfman 50 n. 49; Dixon 603.

To "provid[e] a 'means . . . for checking at the threshold new adjustments that might subsequently prove to be unreasonable or discriminatory, safeguarding the community against irreparable losses and recognizing more fully that the Commission's essential task is to establish and maintain reasonable charges and proper rate relationships.'" *Chessie, supra,* at 513, quoting 1 Sharfman 59, Congress passed the Mann-Elkins Act of 1910, 36 Stat. 539. Section 12 of that Act, 36 Stat. 552, amended § 15 of the Interstate Commerce Act to allow the Commission to suspend "any schedule stating a new individual or joint rate, fare, or charge" for a period not to exceed 10 months. The suspension power conferred was intended to be a "particularly potent tool," giving the Commission "'tremendous power.'" *Chessie,* 426 U. S., at 513, quoting 45 Cong. Rec. 3471 (1910) (statement of Sen. Elkins speaking on behalf of majority report).

Section 15 of the Act, as augmented by the Hepburn and Mann-Elkins Acts, thus works with §§ 1 and 6 of the Act, 49 U. S. C. §§ 1 and 6, to give the Commission a complete rate-making charter. Section 1, as we have indicated above, sets the standard rates and charges must meet and § 6—which prohibits a carrier covered by Part I from engaging in interstate transportation unless its rates, fares, and charges have been filed and published and which, in addition, allows changes in any rate, fare, or charge to be made only after notice to the Commission and public through advance filing of schedules showing the proposed changes, see 49 U. S. C. §§ 6 (1), 6 (3), and 6 (7)—insures both that the Commission will have sufficient notice to exercise its suspension power and that no carrier can operate on suspended or disapproved schedules.

III

With this background in mind, we turn to the question whether the Commission is authorized by § 15 (7) to suspend the initial rates of a common carrier subject to Part I of the Interstate Commerce Act.

Section 15 (7) states "[w]henever there shall be filed . . . *any* schedule stating a *new* individual or joint rate, fare, or charge, . . . the Commission . . . may from time to time suspend the operation of such schedule . . . ." (Emphasis added.) It is hard to imagine a rate any more "new" than those filed for TAPS, a service which has never before been offered. And, since § 15 (7) applies to *any* new rate, there is little room to argue that Congress meant the suspension power not to apply to this case, although we recognize that the Court of Appeals found that § 15 (7) had no plain meaning. See 557 F. 2d, at 781.

Nonetheless, petitioners argue that new does not really mean new, but refers only to increased or changed rates, *i. e.,* rates which replace other rates previously in effect. As we understand the argument, it draws on three sources. First, it is said that Congress in 1910 was directing its attention solely to the problem of increased railroad rates and, therefore, that the statute should be limited to this application. Second, petitioners argue that the only rate schedules the Interstate Commerce Act requires to be filed prior to their effective date are schedules of *changed* rates. See 49 U. S. C. § 6 (3). Since in their view § 15 (7) is intended to work in tandem with § 6 (3), petitioners conclude that new schedules include only changed schedules. Finally, petitioners point to language added to § 15 (7) by § 418 of the Transportation Act of 1920, 41 Stat. 484–487, which they say authoritatively glosses the word "new," limiting it to the increased rate situation. We find these arguments unpersuasive.

A

This Court, in interpreting the words of a statute, has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute' . . . [b]ut it is otherwise 'where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act . . . .'" *Commissioner* v. *Brown,* 380 U. S. 563, 571 (1965) (citations omitted). Under this test, a restriction on the "literal or usual meaning" of the word "new" is not warranted by the legislative history of the Mann-Elkins Act.

First, petitioners' claim that the Commission is without authority to suspend initial rates is not limited to situations in which proposed initial rates are in some sense reasonable; it is a claim that a carrier can impose any rate it chooses.[20] Nor have petitioners pointed to any mechanism which would tend to make initial rates reasonable, and Congress in 1910 concluded that the reparations provisions of the Commerce Act are an insufficient check. Moreover, in these cases, the reparations remedy is particularly ineffective since those who will ship oil over TAPS are almost exclusively parents or co-subsidiaries of TAPS owners.[21] Thus, to an indeterminate, but possibly large extent, excess transportation charges to shippers will be offset by excess profits to TAPS owners, creating a wash transaction from the standpoint of parent oil companies. Indeed, it is telling that no shipper of oil protested the TAPS rates. Instead, as one might predict from experience under the Hepburn Act, see *supra,* pp. 8–10, only the public perceives that it will be injured by the proposed TAPS

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[20] See III App. 17–18:

"[ICC] Commissioner Hardin: If we do not have the power to suspend then would the carriers be in a position to file a rate, say, at $35 per barrel, and the Commission still could not suspend that?

"[Exxon counsel]: If you do not have that power, that would be right."

[21] The United States, pointing to an agreement between Sohio and BP that Sohio will tender to BP oil to the extent of the latter's TAPS ownership, computes the relationship between equity interests and TAPS interests as follows:

Carrier	TAPS Interest	Oil Interest
Sohio/BP	49.18%	53.155%
ARCO	21.00	20.274
Exxon	20.00	20.274
Mobil	5.00	2.094
Phillips	1.66	2.044
Amerada Hess	1.50	.538
Union Oil	1.66	0.000
Ten Others	0.00	1.619

United States Brief 7–8, n. 4. The oil equity interests computed by petitioners are different, but not substantially so. See Brief for Petitioners 6 n. 6.

rates and has objected to them. See *supra,* nn. 6–8. Therefore, in the absence of suspension authority, unreasonable initial rates—both generally and in these cases—like unreasonable increases in existing rates, will almost certainly be passed along to "a prior producer or . . . to the ultimate consumer." 1 Sharfman 51.

Second, if the Commission has no authority to suspend initial rates, it follows that Congress cannot have meant to foreclose whatever equity power there is in the courts to enjoin carrier rates. Thus, with respect to initial rates, courts might again reach "diverse conclusions," jeopardizing "the regulatory goal of uniformity," and "causing in turn 'discrimination and hardship to the general public.'" *Arrow,* 372 U. S., at 664, quoting ICC Annual Report 10 (1907).[22]

Accordingly, far from reaching an "'absurd resul[t]'" which would "'thwart the obvious purpose of the statute,'" *Brown,* 380 U. S., at 571, a literal reading of the word "new" in § 15 (7) is necessary to curb mischief flowing from unchecked initial rates, which is in every way identical to that flowing from unchecked changes in rates to which the Mann-Elkins Act is concededly addressed. Given the equivalence of the harms resulting from unchecked initial and changed rates, only unequivocal statements in the legislative history of the Act would support any limitation on the scope of the suspension power. Petitioners, however, have been able to offer only isolated remarks made in floor debates in favor of their position.[23] These show at most that the primary area of congressional concern was the situation in which railroads increased their pre-existing rates. There is nothing to show that Congress intended to limit the suspension power to this situation, however, and, indeed, other isolated remarks show quite clearly that Representative Mann, at least, thought both initial and changed rates could be suspended.[24] Therefore, we conclude that the word "new" must be given its literal interpretation, which embraces the rates that are the subject of this litigation.[25]

B

Nor do we think much can be made of the fact that Congress, in Part I of the Interstate Commerce Act, sometimes refers to "new" rates and sometimes to "changed" rates.

While it is true that § 6 (3) of the Act provides that "[n]o *change* shall be made in . . . rates . . . *which have been filed and published* by any common carrier . . . except after thirty days' notice to the Commission and to the public," (emphasis added), we do not not read this section to restrict § 15 (7), as petitioners do. Central to petitioners' argument is the premise that § 6 (3) provides the exclusive procedure through which tariffs can be filed with the Commission. But this is not so.

We can agree that § 6 (3) simply cannot describe the procedure to be followed for filing initial rates since that section, by its terms, applies only to changes in tariffs which have previously been filed with the Commission and initial tariffs by definition have not been so filed. However, the conclusion that § 6 (3) cannot govern the filing of initial tariffs only begins the analysis, for § 6 (1) of the Act—which states "[e]very common carrier . . . shall file with the Commission . . . schedules showing *all* the rates, fares, and charges for transportation [over its routes,]" 49 U. S. C. § 6 (1) (emphasis added)—plainly requires initial rates as well as rates resulting from tariff changes to be filed with the Commission. Since initial tariffs cannot be filed under § 6 (3), the question therefore arises how initial tariffs are to be filed.

The Interstate Commerce Act gives no answer to this question; § 6 is silent on the issue. However, the Commission provided an answer by regulation in 1906 in order to clarify carrier obligations under the then recently enacted Hepburn Act.[26] In that year, the Commission issued Tariff Circular No. 2–A, which provided:

> "NEW ROADS.—On new lines of road, including branches and extensions of existing roads, individual rates may be established in the first instance, and also joint rates to and from points on such new line, without notice, on posting a tariff of such rates and filing the same with the Commission."

The immediately preceding paragraph of the same Circular provided that "Changes in Rates" had to be filed on 30 days' notice, which suggests that the Commission was aware that the 30 day requirement of § 6 (3), and indeed that § 6 (3) itself, was inapplicable to initial rates for "new roads." The rule announced in Circular 2–A became Rule 44 of Tariff Circular 14–A in 1907 and Rule 57 of Tariff Circular 15–A in 1908, a numerical designation which has been retained to this day. See 49 CFR § 1300.57 (1976).[27]

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[22] In the past, actions for injunction were brought in diversity under the common law of carriers or under federal question jurisdiction on the theory that the Sherman Act was being violated by a rate increase or alternatively that there was an implied right of action under § 1 of the Interstate Commerce Act, 49 U. S. C. § 1. See, *e. g., Northern Pac. R. Co.* v. *Pac. Coast Lumber Mfgr's,* 165 F. 1 (CA9 1908); *Jewett Bros. & Jewett* v. *Chicago, M. & St. P. R. Co.,* 156 F. 160 (CCDSD 1907). The provisions consolidating judicial review of ICC orders in a single court of appeals, see *supra,* n. 17, are therefore not apposite to actions for injunctive relief and it would still be possible for district courts to reach conflicting views about the propriety of injunctive relief, a conflict that would create the rate discriminations sought to be ended by the Mann-Elkins Act.

[23] Petitioners place particular emphasis on the following statement of Representative Mann:

> "[W]hen the railroad company then files this schedule of rates proposing to increase the rates, we say it is of reasonable presumption that the rate which has existed, possibly for a long time—but whether for long or short, the one in existence—is a fair rate, and should remain in force until the commission has had an opportunity to give some investigation to the subject. That seems to be fair to the railroad company and fair to the shipper." 45 Cong. Rec. 4713 (1910).

Just before this, however, Mann stated:

> "We have therefore provided in the bill that where the schedule of rates is filed with the commission proposing to *change* an existing rate, the commission shall have authority to suspend the taking effect of that rate; *and* we provide that when there shall be filed with the commission a schedule stating a *new* rate or classification or regulation or practice, the commission . . . may suspend the operation of the proposed rate, classification, regulation, or practice . . . ." *Id.,* at 4711 (emphasis added).

Thus, Mann quite clearly recognized that the suspension power extended to both changes in rates and schedules stating initial rates. Moreover, Mann, in defending the suspension power, felt the need to discuss the situation in which a carrier puts in a rate "upon a new article." *Id.,* at 4711–4712. If the suspension power was meant to apply only where there was an old rate in effect, this element of Mann's defense would have been superfluous.

Petitioners also rely on statements made in the Senate which appear to refer solely to the rate increase situation. See Brief for Petitioners 22 n. 29. These remarks, however, refer to an amendment to the Mann-Elkins Act, ultimately defeated, 45 Cong. Rec. 6915 (1910), introduced by Senator Cummins which prevented any change in rate "which is an increase over the then existing rate," *id.,* at 6409, from becoming effective until the Commission approved it. Therefore, the remarks are not relevant to an interpretation of the Act as passed.

[24] See *supra,* n. 23.

[25] Petitioners also argue that, were the Commission given authority to suspend initial rates, carriers would be prohibited for an extended period of time from using their facilities. This, they further argue, would constitute a confiscation prohibited by the Due Process Clause. As we indicate *infra,* at n. 33, petitioners' major premise is misguided because suspension of initial rates does not pretermit filing of a lower rate to go into effect in the suspension period. Therefore, although a carrier may not be allowed to operate under its preferred rate, it is by no means obvious that it will have to refrain from operations or operate under a confiscatory tariff during the suspension period.

[26] Since the 1906 regulation is a "contemporaneous construction of [the Act] by the men charged with the responsibility of setting its [tariff] machinery in motion," *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315 (1933), its interpretation of how § 6 (1) should be implemented is presumptively correct. See, *e. g., ibid.; Udall* v. *Tallman,* 380 U. S. 1, 16 (1965).

Thus, in 1910 when the Mann-Elkins Act was passed, Commission practice was quite clear. Initial tariffs were filed under Rule 57 on one day's notice (later changed to 10 days' notice) and tariff changes were filed under the provisions of § 6 (3). Since both the Rule and the Act provided that tariffs should be filed with delayed effective dates, it was clearly possible for the Commission to suspend either initial or changed rates. Consequently, we find no basis for concluding either that § 6 (3) in fact provides the exclusive procedural avenue for filing tariffs or that Congress in 1910 would have thought that it did.

Similarly, although § 418 of the Transportation Act of 1920, 41 Stat. 484–487, added a sentence to § 15 (7)—"if the proceeding has not been concluded [within the suspension period], the proposed change . . . shall go into effect at the end of such period"—nothing in the legislative history of that Act suggests that "change" is to be read to restrict the scope of the suspension power. Moreover, the amending language of § 418 itself refers to both changed rates and rate increases, which would suggest that changed rates include more than rate increases.[28]

Finally, as we have indicated, the tariff provisions in Part I of the Act did not spring full-grown into the statute books. Section 6 (3), part of the 1887 Act, was drafted at a time when the Commission had no ratemaking authority. Section 15 (7) traces to three Acts—the 1887 Act, the Hepburn Act, and the Mann-Elkins Act—and was then further amended by the Transportation Act of 1920. Since, therefore, the tariff provisions grew more like Topsy than Athena, it is inappropriate to insist that each phrase in those provisions fit meticulously with every other. Instead, the Act must be construed not only by its language but by its purposes if sense is to be made of the verbal accretions of many years. Under this proper standard of construction, there is little to commend the argument that the word "change" was meant to narrow "new." To the contrary, the opposite construction—that "new" was intended to clarify the meaning of "change"—is more justified given the purposes of the Hepburn and Mann-Elkins Acts. Indeed, when Congress did enact comprehensive tariff schemes in Parts II,[29] III,[30] and IV[31] of the Interstate Commerce Act, which cover (respectively) motor carriers, common carriers by water, and freight forwarders, it indicated unequivocally in the language of the suspension provisions that initial rates were "new" rates capable of being suspended and yet references to "changed" rates appear in those Parts in each place they appear in Part I.[32]

C

For the reasons stated above, we conclude that the Commission is authorized by § 15 (7) to suspend rates which are "new" in the sense that they apply to services which have never before been offered to the public.

IV

Our conclusion that the Commission can suspend TAPS' initial rates does not end our inquiry, for petitioners also argue that the Commission has here exceeded whatever power it has to suspend tariffs. Pointing to the Commission's calculation of rates which it would allow to go into effect during the suspension period, they state that the Commission has set rates without the hearing required by 49 U. S. C. § 15 (1).[33] We disagree.

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[27] Tariff circulars covering oil piplines were apparently not promulgated until 1928. In that year Tariff Circular No. 20, which superseded all earlier Circulars, was promulgated and its version of Rule 57 provided that "[r]ates from, to, via, or at points reached via newly laid pipe lines . . . may be established or changed in like manner and upon like notice to that provided for newly constructed lines of railroad . . . ." Tariff Circular No. 20, Rule 57 (e). This provision is now codified as 49 CFR 1300.57 (e) (1976) and is the provision under which TAPS rates were filed with the Commission. See Brief for Petitioners 6.

[28] "[I]f the proceeding has not concluded . . . , the proposed *change* . . . shall go into effect . . . , but, in case of a proposed *increased* rate or charge [the Commission may impose record-keeping and refund requirements on the carrier]." 41 Stat. 487 (emphasis added).

[29] 49 U. S. C. §§ 301–327.

[30] 49 U. S. C. §§ 901–923.

[31] 49 U. S. C. §§ 1001–1022.

[32] The relevant provisions of § 15 (7) are reproduced *in haec verba* in 49 U. S. C. §§ 316 (g) ("Whenever there shall be filed with the Commission any schedule stating a new . . . rate, fare, [or] charge . . . , the Commission . . . may . . . suspend the operation of such schedule. . . ."); 907 (g) ("Whenever there shall be filed with the Commission any schedule . . . stating a new rate, fare, [or] charge . . . , the Commission . . . may . . . suspend the operation of such schedule . . . ."); and 1006 (e) ("Whenever there shall be filed with the Commission . . . . any tariff stating a new rate, charge, classification, regulation, or practice, the Commission . . . may . . . suspend the operation of such tariff . . . ."). As enacted, § 316 (g) provided that the suspension power "shall not apply to any *initial* schedule or schedules filed by any . . . carrier in bona fide operation when this section takes effect." Motor Carrier Act of 1935, § 216 (g), 49 Stat. 559, 560 (emphasis added). This provision was subsequently amended to state: "this paragraph shall not apply to any *initial* schedule or schedules filed on or before July 31, 1938, by any . . . carrier in bona fide operation [on October 1, 1935.]" Act of June 29, 1938, ch. 811, § 16, 52 Stat. 1240 (emphasis added). Substantially identical provisos—each exempting *initial* rates from suspension until a date certain—can be found in §§ 907 (g) and 1006 (e). These provisos are significant here.

First, they demonstrate that Congress understood the words "any schedule stating a new rate" to include initial rates, that is, rates filed with the Commission for a service not previously under tariff. If this were not so, a grandfather proviso would have been entirely unnecessary. Second, because Congress grandfathered only rates filed within a specified time period, the inference is strong that initial rates filed subsequent to that period were (and are) subject to suspension. This inference is confirmed by the legislative history of § 316 (g).

As indicated, § 316 (g) as enacted did not contain a cut-off date in the grandfather proviso. In 1938, a cut-off date was provided by amendment. This change was explained by the House Committee report as follows:

"Sectio[n 16] . . . propose[s] to amend sectio[n] [316 (g)] . . . to permit the Commission to suspend any initial schedule of a common carrier . . . filed after the date that the provisions of the bill shall have become effective. The purpose of the proposed amendment is to prevent future filings of initial tariffs and schedules by motor carriers who were in bona fide operation on June 1, or July 1, 1935, without the exercise by the Commission of its suspension power." H. R. Rep. No. 2714, 75th Cong., 3d Sess., p. 4 (1938).

While there is no grandfather clause in § 15 (7) itself which would confirm its application to initial rates, Congress was doubtless attempting to recreate the scheme of § 15 (7) in Parts II–IV of the Act and expressly stated this on two occasions. See H. R. Rep. No. 1217, 76th Cong., 1st Sess., pp. 23–24 (1939); H. R. Rep. No. 2066, 77th Cong., 2d Sess., p. 22 (1942). Moreover, since § 15 (7) is in all respects *in pari materia* with §§ 316 (g), 907 (g), and 1006 (e), the plain meaning of the latter sections should be given significant weight in construing the former. See *United States* v. *Freeman*, 3 How. 556, 564–565 (1845); *United States* v. *Stewart*, 311 U. S. 60, 64–65 (1940); *Erlenbaugh* v. *United States*, 409 U. S. 239, 243–244 (1972).

In addition, the fact that §§ 316 (g) and 1006 (e) plainly apply to initial rates defeats petitioners argument that the word "change" in either § 6 (3) or § 15 (7) of the Act narrows the word "new." Counterparts to § 6 (3) are found in §§ 317 (c) and 1005 (d), each of which, like § 6 (3), states: "No *change* shall be made in any rate . . . except after thirty days' notice . . . ." (Emphasis added). Since §§ 317 (c) and 1005 (d) are intended to work with §§ 316 (g) and 1006 (e), respectively, in the same way § 6 (3) works with § 15 (7), it is clear that the word "change" does not limit the scope of the suspension power. Similarly, each of §§ 316 (g), 907 (g), and 1006 (e) contain language identical to that added to § 15 (7) by the Transportation Act of 1920, see *supra*, p. 17, which again shows that the word "change" cannot be given any restrictive meaning.

The reason the Commission has been given power to suspend is to prevent irreparable harm to the public during the time when it has under consideration the lawfulness of a proposed rate. See Part II, *supra*. The foundation for a suspension is the Commission's conclusion that a proposed rate is probably unreasonable or unjust. See, *e. g.*, *TAPS*, 355 I. C. C., at 81–82. To make such a determination, the Commission is obviously required to form a tentative opinion about the location of the line between the just and the unjust, the reasonable and the unreasonable. Moreover, the Commission is required by § 15 (7) to set out its reasons in writing for suspending a tariff. The usual and sufficient reason will be that the Commission has found a proposed tariff to fall on the unjust or unreasonable side of the line it has drawn, and it is a reason of precisely this sort that the Commission has given here. See *id.*, at 81–83.

Petitioners do not apparently disagree that the Commission can suspend a tariff because it falls on the wrong side of the line of reasonableness, but they would prevent the Commission in suspending a tariff from stating, as it did here, where the tentative dividing line lies. Such a statement, they say, is ratemaking. But this is untenable: No principle of law requires the Commission to engage in a pointless charade in which carriers desiring to exercise their § 6 (3) rights are required to submit and resubmit tariffs until one finally goes below an undisclosed maximum point of reasonableness and is allowed to take effect. The administrative process, after all, is not modeled on "The Price is Right." What the Commission did here, therefore, far from being condemnable, is an intelligent and practical exercise of its suspension power which is thoroughly in accord with Congress' goal, recognized in *Arrow*, 372 U. S., at 664–666; see *United States* v. *SCRAP*, 412 U. S. 669, 697 (1973), to strike a fair balance between the needs of the public and the needs of regulated carriers. Indeed, the Commission might well have been derelict in its duty had it insisted on charade once it had determined that there was a way TAPS could operate without harm to the public. Cf. *Arrow, supra; SCRAP, supra;* 43 U. S. C. § 1651 (a) (1970 ed., Supp. V) (congressional policy favors "[t]he early development and delivery of oil . . . from Alaska's North Slope to domestic markets").

V

Finally, petitioners contend that the Commission has no power to subject them to an obligation to account for and refund amounts collected under the interim rates in effect during the suspension period and the initial rates which would become effective at the end of such period. They point to the absence of any express authority for such refund provisions and also to the fact that § 15 (7) does provide expressly for refunds in a limited category of circumstances, namely, where there is an "increase[d] rate or charge for or in respect to the transportation of property," which has become effective at the end of a suspension period. This statutory pattern, they suggest, indicates that Congress considered and rejected any broader refund scheme, thereby curtailing any ancillary power to order refund provisions that the Commission might otherwise have.

In response, we note first that we have already recognized in *Chessie* that the Commission does have powers "ancillary" to its suspension power which do not depend on an express statutory grant of authority. We had no occasion in *Chessie* to consider what the full range of such powers might be, but we did indicate that the touchstone of ancillary power was a "direct[t] relat[ionship]" between the power asserted and the Commission's "mandate to assess the reasonableness of . . . rates and to suspend them pending investigation if there is a question as to their legality." 426 U. S., at 514. Applying this test, we found in *Chessie* a direct relationship which justified the Commission in insisting that the proceeds of proposed general railroad rate increases be used to pay for deferred maintenance. If such a use was made of the proceeds, the rates were reasonable; but they might not be reasonable if put to other purposes. *Ibid.* We also noted that "[d]elay through suspension would only have aggravated the already poor condition of some of the railroads." *Ibid.* Thus, we approved the deferred maintenance condition essentially because it was necessary to strike a proper balance between the interests of the carriers and the interests of the public.

The situation here is very similar. Even a cursory glance at the pleadings before the Commission shows that extended adjudicatory proceedings will be required to resolve the question of precisely what are fair rates. Accordingly, it is not apparent how the Commission could discharge its mandate under § 15 (7) summarily "to assess the reasonableness of [TAPS] rates," *ibid.*, while considering the interest of the TAPS carriers in beginning operations, unless it could make gross approximations of the sort it made in this proceeding, in which it essentially accepted carrier-supplied data as true and properly included in the TAPS rate base notwithstanding protests to the contrary. See *TAPS*, 355 I. C. C., at 83; *supra*, p. 4, and n. 12. But if such approximations are to be used to meet the needs of carriers, it is plain that refund provisions are a necessary and "directly related," *Chessie*, 426 U. S., at 514, means of discharging the Commission's other mandate to protect the public pending a more complete determination of the reasonableness of the TAPS rates.

Thus, here as in *Chessie*, the Commission's refund conditions are a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation," in that they allow the Commission, in exercising its suspension power, to pursue "a more measured course" and to "offe[r] an alternative tailored far more precisely to the particular circumstances" of these cases. *Ibid.* Since, again as in *Chessie*, the measured course adopted here is necessary to strike a proper balance between the interests of carriers and the public, we think the Interstate Commerce Act should be construed to confer on the Commission the authority to enter on this course unless language in the Act plainly requires a contrary result.

We turn, therefore, to the language in § 15 (7) on which petitioners rely. This language was not part of the Mann-Elkins Act, but was added by the Transportation Act of 1920. See § 418 of the Act, 41 Stat. 484, 487. Section 418 rearranged the paragraphs of § 15 of the Interstate Commerce Act and made numerous modifications to the text of that section. Among other things, § 418 reduced the suspension period created by the Mann-Elkins Act from 10 months to 120 days. According to Commissioner Clark, this change was intended to alleviate complaints by the railroads that the 10-month period too long deprived them of needed revenue in the situation in which proposed rates were ultimately determined to be reasonable. See 1 Hearings on H. R. 4378 before the House Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess., 30–31 (1920). To protect shippers, the reduction in suspension period was counterbalanced with a provision authorizing the Commission to require carriers to keep account of and refund amounts collected under tariffs which became effective after a 120-day suspension. See *ibid.* The provisions were summarized in the Report of the Conference Committee which described the provisions of the House bill which provided the text of § 418:

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[33] Petitioners also argue that, for suspension to be lawful, the Commission had to make a "finding that it would be preferable to defer operation of the Trans Alaska Pipeline rather than to commence operation at the carriers' original rates." Brief for Petitioners 36. We find no basis in the Interstate Commerce Act to support such an argument. Indeed, § 6 (3) of the Act, 49 U. S. C. § 6 (3), authorizes a carrier to submit new tariffs at any time. This authority does not lapse once one tariff for a proposed service is suspended. To the contrary, the Commission cannot refuse to file a tendered tariff simply because it has already suspended other tariffs for the same service. See *AT&T* v. *FCC*, 487 F. 2d 864, 870–881 (CA2 1973). Petitioners, therefore, would require the Commission, in making suspension decisions, to blink at the reality that carriers whose initial rates are suspended will submit interim rates to avoid the almost certain losses that would accrue were the commencement of service postponed altogether.

> "[The House bill provided that] as to freight rates the carrier should keep a record in all cases where the Commission had not concluded such a hearing, and, if the Commission finally found the rates too high, the carrier was required to make refunds to the shippers affected." H. R. Rep. No. 650, 66th Cong., 2d Sess., p. 66 (1920).

This passage, which declares that Congress sought to protect the public in *"all cases"* in which a hearing had not been concluded by the termination of the suspension period, certainly cannot be read to indicate that Congress placed any emphasis on the word "increased" or intended to limit the Commission's ancillary powers. Indeed, the House Report on the same bill, H. R. Rep. No. 456, 66th Cong., 2d Sess., pp. 20–21 (1920), appears to refer to "increased" rates only to distinguish them from "decreased" rates, over which the 1920 Act for the first time gave the Commission some authority by conferring power to set minimum rates, see *id.*, at 19, and as to which there is no need to create a refund procedure to protect shippers. From this very sketchy history, therefore, it seems that Congress' purpose was to create a remedy less cumbersome than the reparations procedure to protect shippers whenever they could be harmed due to the shortened suspension period created by the 1920 Act. See *Arrow,* 372 U. S., at 665–666. Accordingly, we conclude that nothing in the Transportation Act precludes what the Commission has done here and, moreover, that the Commission's actions are completely consistent with what Congress intended when it drafted the 1920 Act.

VI

For the reasons stated above, the judgment below is in all respects

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

ANDREW J. KILCARR, Washington, D.C.; RICHARD J. FLYNN, Washington, D.C.; and JOSEPH QUINN O'CONNELL, Washington, D.C. (MAUREEN O'BRYON, DONOVAN LEISURE NEWTON & IRVINE, WILLIAM J.T. BROWN, JAMES R. KINZER, WILLIAM R. CONNOLE, EUGENE E. THREADGILL, CONNOLE & O'CONNELL, JACK VICKREY, GEORGE H. HAGLE, DAVID M. SCHWARTZ, SULLIVAN & WORCESTER, LEE A. MONROE, JOSEPH B. TOMPKINS, JR., SIDLEY & AUSTIN, FRANK L. HEARD, JR., ROBERT E. JORDAN, III, JAMES H. PIPKIN, JR., STEVEN H. BROSE, STEPTOE & JOHNSON, JOHN T. UPDEGRAFF, JACK LANSDALE, JR., COX LANGFORD & BROWN, ALBERT S. TABOR, JR., and VINSON & ELKINS, with them on the brief) for petitioners; FRANK H. EASTERBROOK, Assistant to the Solicitor General, and AVRUM M. GROSS, Attorney General, State of Alaska (WADE H. McCREE, JR., Solicitor General, JOHN H. SHENEFIELD, Assistant Attorney General, MARK L. EVANS, General Counsel, CHARLES H. WHITE, JR., Associate General Counsel, ROBERT R. NORDHAUS, General Counsel, and PHILIP R. TELLEEN, FER Attorney, PHILIP ELMAN, ROBERT M. LICHTMAN, TERRY F. LENZNER, ROBERT E. NAGLE, MARC E. LACKRITZ, O. YALE LEWIS, WALD, HARKRADER & ROSS, and WICKWIRE, LEWIS, GOLDMARK, DYSTEL & SCHORR, with them on the brief) for respondents.

NOS. 76–1159 AND 76–1416

Arthur F. Quern, Etc., et al., Petitioners, 76–1159 *v.* Venus Mandley el al. Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare, Petitioner, 76–1416 *v.* Venus Mandley et al.	On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 6, 1978]

Syllabus

This litigation originated as a challenge to the validity of Illinois' Emergency Assistance to Needy Families with Children (EA) program under Title IV–A of the Social Security Act (SSA). The Court of Appeals, reversing the District Court, first held that the program was invalid because it limited eligibility for such assistance more narrowly than § 406 (e)(1) of the SSA, which makes federal matching funds available under a state EA program for emergency aid to intact families with children if threatened with destitution, regardless of the cause of the need. In a later appeal involving the validity of a proposed alternative to the EA program, the Court of Appeals held that § 403 (a)(5) of the Act, which authorizes federal funding of a state EA program, is the exclusive source of federal funds for a state program of emergency assistance and that therefore a new "special needs" program that Illinois proposed to operate under its Title IV–A Aid to Families with Dependent Children (AFDC) program, funded under § 403 (a)(1) of the SSA, in place of its withdrawn EA program, must, as a *de facto* EA program, extend aid to all persons eligible under § 406 (e)(1). *Held:*

1. There is nothing in the policies or history of the EA statute to indicate that Illinois' proposed "special needs" program should not be judged solely under the requirements for an AFDC program funded under § 403 (a)(1) without regard to the EA requirements of §§ 406 (a) and 403 (a)(5).

2. The proposed "special needs" program is permissible as part of an AFDC program alone. A plan to meet certain emergency needs of AFDC recipients—specifically actual or threatened loss of shelter due to damage or eviction—is not necessarily improper as an AFDC "special needs" program simply because it addresses a nonrecurring need that could alternatively be provided for under an EA program.

3. Neither § 402 (a)(10) of the SSA, which makes *AFDC,* not EA, eligibility criteria mandatory, nor § 406 (e), which defines the *permissible* scope of an EA program for purpose of federal funding, imposes mandatory eligibility standards on States that elect to participate in the EA program, and therefore Illinois is not precluded from receiving matching federal funds for either an EA or a "special needs" program simply because it limits eligibility for aid under that program more narrowly than § 406 (e).

545 F. 2d 1062, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which all Members joined except BLACKMUN, J., who took no part in the consideration or decision of the cases.

MR. JUSTICE STEWART delivered the opinion of the Court.

These cases require examination of the interplay between state option and federal mandate within the system of cooperative federalism created by the public assistance programs of Title IV–A of the Social Security Act, 42 U. S. C. § 601 *et seq.* The ultimate question to be decided is whether a

State may ever receive federal matching funds for a program of emergency assistance to needy families, either under the general program of Aid to Families with Dependent Children (AFDC)[1] or under the specific provisions for Emergency Assistance to Needy Families with Children (EA),[2] if it limits eligibility for such aid more narrowly than the federal EA statute.

I

Title IV–A of the Social Security Act establishes several different public aid programs under the general rubric of "Grants to States for Aid and Services to Needy Families with Children." In order to receive federal funds under any of the Title IV–A programs a State must adopt a "state plan for aid and services to needy families with children" that is approved by the United States Department of Health, Education, and Welfare (HEW) as meeting the requirements set forth in § 402 of the Act.

AFDC is the core of the Title IV–A system. As the Court observed in one of its earliest forays into Title IV, AFDC is a categorical aid program, and "the category singled out for welfare assistance . . . is the 'dependent child,' who is defined in § 406 of the Act . . . as an age-qualified 'needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent,' and who is living with any one of several listed relatives." *King* v. *Smith*, 392 U. S. 309, 313. A State's expenditures for AFDC, under an approved § 402 state plan, are reimbursed by the Federal Government according to the formula set forth in § 403 (a)(1).

The federal EA program was added to Title IV as part of the omnibus Social Security Amendments of 1967. Pub. L. 90–248, § 206, 81 Stat. 893. It was described in the Senate Finance Committee report as "a new program optional with the States [to] authorize dollar-for-dollar federal matching to provide temporary assistance to meet the great variety of situations faced by needy children in families with emergencies." S. Rep. No. 744, 90th Cong., 1st Sess., p. 4 (1967). To participate in the program a State must include a provision for EA in its § 402 state plan, and funding at a flat rate of 50% of program expenses is authorized by § 403 (a)(5).

Unlike AFDC, eligibility for EA is not limited to "dependent children." Instead, the term "emergency assistance to needy families with children" is broadly defined in § 406 (e) to include money payments and other kinds of aid provided on a temporary basis "to avoid destitution . . . or to provide living arrangements for" a "needy child under the age of 21 who is . . . without available resources." 42 U. S. C. § 606 (e)(1). Thus under the EA statute, federal matching funds are available for emergency aid to intact families with children if threatened with destitution, regardless of the cause of their need.

The State of Illinois, however, elected to adopt an EA program of much narrower scope. It provided only for (1) aid to AFDC families who were without shelter as a result of either damage to their homes or court-ordered eviction for reasons other than nonpayment of rent; and (2) aid to applicants determined to be presumptively eligible for AFDC who were in immediate need of clothing or household furnishings.

In 1973 the respondents instituted a class action against state and federal officials on behalf of "all AFDC recipients, applicants for AFDC, and other families with needy children in Illinois" seeking a declaratory judgment that the Illinois EA program violated federal law by defining eligibility more narrowly than § 406 (e)(1), and an injunction restraining the defendants from administering the allegedly unlawful program.[3] The United States District Court for the Northern District of Illinois held in an unreported opinion that the State's program was not inconsistent with federal law. The Court of Appeals for the Seventh Circuit reversed this judgment, ruling that "Illinois may no longer conduct an emergency assistance program under [§ 406 (e)] in which some of the families with needy children described in [§ 406 (e)] are given aid and some are not." *Mandley* v. *Trainor*, 523 F. 2d 415, 423 (*Mandley I*).

After the Court of Appeals' mandate was returned to the District Court, the plaintiffs submitted a proposed final order requiring the State to conform its EA program to the provisions of § 406 (e) and further requiring the federal defendants to promulgate regulations consistent with the Court of Appeals' interpretation of the statute. The state and federal defendants not only opposed the substantive terms of the proposed order, but also filed motions to dismiss the complaint altogether on the ground that the case had been rendered moot by the State's decision to withdraw entirely from the EA program. In support of its motion the State filed an affidavit from the Chief Fiscal Officer of its Department of Public Aid stating that "the Department would immediately cease all activities and requests for federal reimbursement pursuant to the 'Emergency Assistance' program of § 406 (e) of the Social Security Act" and that "no additional § 406 (e) federal funds [would] be drawn for the balance . . . of the fiscal year."

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[1] The AFDC program is established and defined in several related provisions of Title IV–A of the Social Security Act. Section 406 (b) of the Act, as set forth in 42 U. S. C. § 606 (b) provides in pertinent part: "The term 'aid to families with dependent children' means money payments with respect to, or . . . medical care in behalf of or any type of remedial care recognized under State law in behalf of a dependent child. . . ." The term "dependent child" is defined in § 406 (a), 42 U. S. C. § 606 (a), as:

"a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with [specified relatives] in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school . . . [or] course of vocational or technical training . . . ."

[2] Section 406 (e) of the Act, as set forth in 42 U. S. C. § 606 (e), provides in pertinent part:

"(1) The term 'emergency assistance to needy families with children' means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is . . . living with any of the relatives specified in subsection (a)(1) . . . but only where such child is without available resources, the payments, care, or services involved as necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution . . . did not arise because such child or relative refused without good cause to accept employment or training for employment—

"(A) money payments, payments in kind, or such other payments as the State agency may specify . . . or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

"(B) such services as may be specified by the Secretary;

"but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

"(2) Emergency assistance as authorized under paragraph (1) may be provided . . . to migrant workers in the State in such part of parts thereof as the State shall designate."

[3] The complaint also alleged that the Illinois program violated the Equal Protection Clause of the Fourteenth Amendment and the Illinois Public Aid Code.

While none of the defendants questioned the District Court's subject matter jurisdiction, the Court of Appeals properly considered the question *sua sponte*. It held that the District Court had jurisdiction of claims against the state defendants under 28 U. S. C. § 1343 and 42 U. S. C. § 1983 since the plaintiffs' constitutional claims were not insubstantial. *Mandley* v. *Trainor*, 523 F. 2d 415, 419 n. 2 (*Mandley I*).

It found the question of jurisdiction over the federal defendants more troublesome, *ibid*. We express no view as to the Court of Appeals' theory of jurisdiction in light of the intervening amendment to 28 U. S. C. § 1331, which, by eliminating the requirement of $10,000 in controversy in any action "against the United States, any agency thereof, or any officer or employee thereof in his official capacity," 28 U. S. C. § 1331 (a) as amended, Pub. L. 99–574, § 2, 90 Stat. 2721, clearly confers jurisdiction over the federal defendants in this case. *Andrus* v. *Charlestone Stone Products Co.*, — U. S. —, — n. 6.

In opposing the motions to dismiss, the plaintiffs argued that even though the State would no longer request federal reimbursement for emergency aid under §§ 406 (e) and 403 (a)(5), it intended nonetheless to operate virtually the identical program as an AFDC "special needs" program and to seek federal reimbursement under § 403 (a)(1). They contended that such a course of conduct would be equally unlawful. The District Court took the position that the validity of any proposed program under the AFDC provisions presented a new question that had not been raised in the original lawsuit, and that the plaintiffs' challenge to the § 406 (e) program had indeed been rendered moot by the State's decision to withdraw altogether from the EA program. When the plaintiffs declined to amend their complaint to allege that the new program would also be in violation of § 403 (a)(1), the District Court entered an order dismissing the cause "for lack of case or controversy."

The Court of Appeals again reversed. *Mandley* v. *Trainor*, 545 F. 2d 1062 (*Mandley II*). Noting that the defendants "admit[ted] that they [were] conducting the same program under the label 'special assistance' that they formerly conducted under the label of emergency assistance," *Id.*, at 1068, the Court of Appeals held that the change in funding arrangements did not raise issues beyond the scope of the plaintiffs' pleadings, and did not render the case moot. As the appellate court viewed the situation, the plaintiffs were still claiming, as they always had, that any federally funded program for emergency assistance must conform with the eligibility standards of § 406 (e)(1), and that the defendants were still violating the federal law by using federal funds to operate an emergency assistance program that defined eligibility more narrowly than § 406 (e)(1). On the merits the Court of Appeals agreed with the plaintiffs that § 403 (a)(5) is the exclusive source of federal funds for a program of emergency assistance, and therefore held that Illinois' proposed new program, as a *de facto* EA program, must extend aid to all persons eligible under § 406 (e)(1).

Because of the lengthy and, in its view, wrongful delay in the implementation of its *Mandley I* mandate, the Court of Appeals then considered *sua sponte* the defendants' objections to the terms of the final order that had been proposed by the plaintiffs after the first remand, and directed the District Court on remand to enter the proposed order with minor modifications. As to the state defendants this order would provide:

> "Defendants . . . are enjoined, so long as Illinois receives federal funding under Title IV–A of the Social Security Act, from claiming reimbursement for emergency assistance (however designated) under any other section of the Act than §§ 406 (e) and 403 (a)(5) and are enjoined from using any other means of limiting eligibility for emergency assistance more narrowly than the provisions of § 406 (e), and are further enjoined from denying emergency assistance . . . to any member of the plaintiff class with a needy child [who is eligible under the definition in § 406 (e)]." [4]

In addition the Secretary of HEW was to be

> "enjoined from approving state plans for emergency assistance which limit eligibility more narrowly than § 406 (e) of the Act or funding an emergency assistance program (however designated) under any provision of the Act other than §§ 406 (e) and 403 (a)(5)." [5]

The broad injunction ordered by the Court of Appeals raises two distinct statutory questions: whether a program of emergency aid to AFDC families may qualify for federal funding under a provision other than § 403 (a)(5), and more particularly as an AFDC "special needs" program under § 403 (a)(1); [6] and whether a State that adopts an EA program under §§ 403 (a)(5) and 406 (e) must define eligibility no more narrowly than § 406 (e).[7] We granted certiorari, —

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[4] As stated in the order, any child:

"(i) who is under the age of 21,

"(ii) who is living with any of the relatives specified in § 406 (a)(1) of the Act in a place of residence maintained by such relative as a home,

"(iii) where such child is without available resources,

"(iv) where emergency assistance is necessary to avoid destitution of or to provide living arrangements in a home for such child, and

"(v) such destitution did not arise because such child or relative refused without good cause to accept employment or training for employment."

[5] The order would further require HEW to "file with the court proposed regulations governing emergency assistance, which proposed regulations shall be in accord with the opinion of the Court of Appeals, with this order and with 45 CFR § 233.10 (a)(1)(ii)(A)."

The plaintiffs' originally proposed order would have specifically required that the regulations "include, inter alia, definitions of such terms as 'necessary to avoid destitution' and 'lack of available resources' which are compatible with providing emergency assistance when a needy child is approaching destitution." While the Court of Appeals thought "it would be salutary to include such definitions in the new regulation," it declined to "order HEW specifically to include any items in its new regulation." 545 F. 2d, at 1073.

[6] The petitioners have not raised in this Court the claim that the validity of the proposed AFDC special needs program was beyond the scope of the pleadings in this case.

[7] We agree with the Court of Appeals that the cases were not rendered moot by Illinois' decision to withdraw from the § 406 (e) program. For even if the proposed arrangement is entirely legal under §§ 402 and 403 (a)(1), the State's decision to withdraw voluntarily from the § 406 (e) program in no way mooted the Court of Appeals' prior determination that that program was being operated in violation of federal law. See *United States* v. *W. T. Grant Co.*, 345 U. S. 629.

By granting the defendants' motions to dismiss, as it was bound to do if the case was indeed moot, the District Court rendered the entire proceeding a nullity. There was no longer any judgment binding on the defendants to prevent them from returning to the old program. And, while the defendants' good-faith representation that they had no intention of doing so might properly have led the District Court to deny injunctive relief, see *Hecht Co.* v. *Bowles*, 321 U. S. 321, it could not operate to deprive the successful plaintiffs, and indeed the public, of a final and binding determination of the legality of the old practice. *United States* v. *W. T. Grant Co., supra*, at 632.

Since the Court of Appeals correctly concluded that the District Court had erred in dismissing the case as moot, the controversy was still alive as to the legality of both the old EA program and the proposed AFDC special needs program. We note that, in a status report to the Illinois Advisory Committee on Public Aid, the State's Director of the Department of Public Aid stated that he intended to request "that HEW clarify its [406 (e)] Emergency Assistance Program [since] there are aspects of a [406 (e)] program that we feel superior to a special need program and we would prefer, if so allowed, to maintain the [406 (e)] Emergency Assistance Program of the present scope." (This status report was filed in the District Court as Exhibit 1 to Plaintiffs' Answer to Defendants' Motions to Dismiss.) Thus while the Court of Appeals had already passed on the legality of the Illinois EA program in *Mandley I*, there was no *jurisdictional* bar to its directing entry of a judgment on remand from *Mandley II* resolving the entire dispute by enjoining the operation of both programs.

U. S. —, to consider these important questions affecting the nationwide administration of a major federal welfare program.

II

As the Court of Appeals readily conceded, its holding in *Mandley I* that federal eligibility standards are mandatory upon States that adopt the optional EA program in no way obligates a State to continue that program. The federal definition of eligibility in § 406 (e), like the other provisions of Title IV of the Social Security Act, simply governs the dispensation of federal funds. See *Townsend* v. *Swank*, 404 U. S. 282, 292 (BURGER, C. J., concurring in the result). And while Congress may attach strings to its offer of federal funding, it does not require the States to accept any federal funds at all.

The Court of Appeals also acknowledged that § 406 (e) does not by its own terms attach any eligibility "strings" to a program funded under the AFDC provisions. If Illinois' plan to meet the emergency needs of AFDC recipients by means of AFDC "special needs payments" was proper under § 403 (a)(1), the broader EA eligibility definition would have no application. The Court of Appeals believed, however, that the requirements of § 406 (e) would be "totally eviscerated" if States could evade them simply by resorting to the AFDC provisions. This effect, in its view, compels the conclusion that § 403 (a)(5) is the exclusive source of federal funds for emergency needs, and therefore that emergency payments of the kind contemplated by the Illinois plan[8] cannot be reimbursed under § 403 (a)(1) as AFDC "special needs."

A

Even assuming the Court of Appeals' premise that § 406 (e) does impose mandatory standards of eligibility for EA, its conclusion simply does not follow. If a State adopts a program that is, for whatever reason, *not* a proper EA program, it is no "evasion" of the requirements of § 406 (e) to seek alternative funding. It is merely an election not to operate an EA program, but to do something quite different instead. Since the statute clearly offers the States an option whether or not to adopt an EA program, it is in no sense "eviscerated" when a State chooses to forego the offer.

The legislative history does not indicate a contrary intent. The Court of Appeals found highly significant the description of EA as an altogether "new" program that would provide federal matching for emergency assistance "for the first time," 113 Cong. Rec. 36319 (1967) (remarks of Sen. Curtis). But, as we have already observed, a critical distinction between EA and AFDC is that eligibility for the former does not depend on the absence of a parent from the home. Thus the enactment of EA extended aid to an entirely new class of families that had not previously been eligible for any form of federal assistance.[9] In this context, the fact that EA was described as a "new" program hardly implies an understanding that the emergency needs of persons who *were* eligible for AFDC could not be met under the existing program.[10] Indeed the contrary understanding is revealed in the observation that emergency assistance to AFDC applicants was "*frequently* . . . unavailable under State programs today." S. Rep. No. 744, *supra*, p. 165. (Emphasis supplied.)

There is nothing, therefore, in the policies or history of the EA statute to indicate that Illinois' proposed AFDC special needs program should not be judged solely under the requirements for an AFDC program funded under § 403 (a)(1), without regard to the EA requirements of §§ 406 (e) and 403 (a)(5). Accordingly, we must consider whether the special needs program proposed by Illinois is permissible as part of an AFDC program alone.

B

Illinois' proposed program would recognize specified emergency needs as "special needs items" within its AFDC "standard of need." The standard of need is a dollar figure set by each State reflecting the amount deemed necessary to provide for essential needs, such as food, clothing and shelter.[11] See *Rosado* v. *Wyman*, 397 U. S. 397, 408. It is the "yardstick" for measuring finanical eligibility for assistance, but the level of benefits actually paid is not necessarily a function of the standard of need. *Ibid.* At least as early as 1966 federal regulations recognized that States could properly include special needs items in their standards of need for AFDC.[12] These "are generally defined as those needs that are recognized by the State as essential for some persons but not for all, and that must therefore be determined on an individual basis." U. S. Social and Rehabilitation Service, Assistance Payments Administration, Characteristics of State Plans for Aid to Families with Dependent Children (1974) at xiii. (AFDC Survey.) Whenever the special need is found to exist, it is budgeted in the total standard of need. *Ibid.*

Frequently the special need is a regular or recurring expense, such as medication or a medically indicated diet, but this is not always the case. On the contrary, the 1974 AFDC Survey, *supra*, reveals that HEW has approved state plans that cover a wide variety of needs under the rubric of "special circumstance items," including one-time emergency needs like replacing major appliances,[13] home repair,[14] and catastrophic loss.[15] Similarly, the loss of shelter because of damage or eviction is a particular, nonrecurring event that befalls some, but not all, AFDC recipients, which may be reflected in an adjustment in the standard of need whenever that event occurs.

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[8] The record does not contain an actual proposal for the contemplated special needs program, since Illinois had not at the time of the Court of Appeals' decision drafted or submitted such a plan to HEW for approval. The court assumed, and the parties agreed, that the program would parallel the old EA program: *i. e.*, it would cover emergencies in AFDC families arising out of the actual or threatened loss of shelter due to damage or eviction and the immediate needs of presumptively eligible AFDC applicants.

[9] "For the first time, the Federal Government will match money for emergency assistance. This has not been in the law before. For a period of 30 days, *emergency assistance can be paid in cases where they cannot meet other qualifications.* 113 Cong. Rec. 36319 (1967) (remarks of Sen. Curtis). (Emphasis supplied.) See also S. Rep. No. 744, 90th Cong., 1st Sess., p. 166 (1967).

[10] Even if their import where clearer, as an expression of Congress' understanding as to the scope of the pre-existing AFDC statute, such *post-hoc* observations by a single member of Congress carry little if any weight. See *Los Angeles Department of Water & Power* v. *Manhart*, — U. S. — (slip op., at 11).

[11] The States have a "great deal of discretion" in setting the standard of need, and "some states include in their 'standard of need' items that others do not take into account." *Rosado* v. *Wyman*, 397 U. S. 397, 408.

[12] "If the State agency includes special need items in its standard [the State plan must] (*a*) describe those that will be recognized, and the circumstances under which they will be included, and (*b*) provide that they will be considered in the need determination for all applicants and recipients requiring them." SRS Program Regulation 20-7, § 233.20 (a)(2)(v) (1966). The identical provision is currently codified at 45 CFR § 233.20 (a)(2)(v).

[13] Illinois and Minnesota. AFDC Survey, at 59, 100.

[14] Arizona, Connecticut, Guam, Iowa, Kansas, Minnesota, New Hampshire, and South Dakota. AFDC Survey, at 3, 27, 69, 73, 100, 125, 179.

[15] California's plan provided for "replacement of clothing and certain household items because of sudden or unusual circumstances beyond [the] control of [the] family." AFDC Survey, at 19. Connecticut, North Dakota and Rhode Island covered needs arising out of "catastrophic" events as special circumstance items. *Id.*, at 27, 147, 169.

By approving state plans that cover nonrecurring emergencies as special needs HEW has expressed its view that such items are properly included in the AFDC standard of need for reimbursement under § 403 (a)(1). The interpretation of the agency charged with administration of the statute is, of course, entitled to substantial deference. *New York Dept. of Social Services* v. *Dublino,* 413 U. S. 405, 421. Moreover, this view is entirely consistent with the well-established principle that the States have "undisputed power to set the level of benefits and the standard of need" for their AFDC programs. *King* v. *Smith,* 392 U. S. 309, 334; *Dandridge* v. *Williams,* 397 U. S. 471, 478; *Rosado* v. *Wyman, supra,* at 408; *Jefferson* v. *Hackney,* 406 U. S. 535, 541. See n. 11, *supra.*

Since Illinois has not in fact submitted a proposed special needs program for approval, see n. 8, *supra,* there is no way of knowing whether such a plan would comply in all other respects with the requirements for an AFDC program. But it is clear that a plan to meet certain emergency needs of AFDC recipients—specifically actual or threatened loss of shelter due to damage or eviction—is not necessarily improper as an AFDC special needs program simply because it addresses a nonrecurring need that could alternatively be provided for under an EA program.

III

Although the Court of Appeals' opinion in *Mandley II* focused on the proposed special needs program, the injunction it ordered to be entered on remand would prohibit not only the operation of such a program under AFDC, but *any* program of emergency assistance that defines eligibility more narrowly than § 406 (e). In substance, therefore, the injunction would enforce *Mandley I*'s holding that § 406 (e) imposes mandatory eligibility standards on States participating in the EA program. Since there is still a live controversy over this issue, see n. 7, *supra,* it is to that question that we now turn.

Section 406 (e) defines EA in terms of four distinct considerations. First, unlike AFDC, it specifies a time limitation: EA may be provided only for a period not to exceed 30 days in any 12-month period. Second, it describes the persons on whose behalf aid may be furnished: needy children under the age of 21 who are living with specified relatives. Third, it defines the circumstances under which aid may be provided: where the child is without resources, and aid is necessary to "avoid destitution or to provide living arrangements for the child." Finally, it describes the method by which aid may be provided: not only cash payments and medical or remedial care, as under AFDC, but also payments in kind and "such services as may be specified by the Secretary." In summary, under EA any family with children that is for any reason threatened with destitution is eligible for emergency aid at least once in a 12-month period, and that aid may be provided by almost any means.

In declaring that Illinois is prohibited from narrowing these broad standards in any way,[16] the Court of Appeals relied on a long line of this Court's cases mapping out the mandatory reach of the AFDC eligibility provisions. As to AFDC, the law is indeed clear. Each State is entirely free to set its own monetary standard of need and level of benefits. *King* v. *Smith, supra,* at 334; *Dandridge* v. *Williams, supra,* at 478; *Rosado* v. *Wyman, supra,* at 408; *Jefferson* v. *Hackney, supra,* at 541.[17] But the States are not free to narrow the federal standards that define the categories of people eligible for aid. Beginning with *King* v. *Smith, supra,* this Court has consistently held that States participating in the AFDC program must make assistance available to *all* persons who meet the criteria of § 406 (a) of the Act. *Carleson* v. *Remillard,* 406 U. S. 598; *Townsend* v. *Swank,* 404 U. S. 282. See also *Lewis* v. *Martin,* 397 U. S. 552. The statutory foundation for this conclusion is § 402 (a)(10), which requires that a State's "plan for aid and services to needy families with children" must provide that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 42 U. S. C. § 602 (a)(10).

The question to be decided is whether these interpretive principles are to be applied to the EA program as well.

A

The short answer is that, since § 402 (a)(10) on its face applies only to "aid to families with dependent children" and not to the separately designated program of "emergency aid to needy families with children," it cannot be the basis for making the § 406 (e) eligibility requirements mandatory on the States.

The Court of Appeals recognized that § 402 (a)(10) was limited by its language to AFDC, but nevertheless concluded that Congress intended to treat EA "in the same way" because it is "part of the same statutory scheme," and rooted in the "same Congressional concern with the deprivation of children that brought forth the AFDC program . . . ." *Mandley I, supra,* at 422. But Congress' choice of precise language in this complex statute cannot be glossed over with such generalities.

The § 402 "state plan for aid and services to needy families with children" is the central, organizing element of the Title IV–A program. A State's plan establishes both its funding relationship with the Federal Government and the substantive terms of all Title IV–A programs in which it has elected to participate. Thus, the plan reflects not only the basic AFDC program of cash assistance defined in § 406 (b), but also Title XX social services, see § 402 (a)(15) and 42 U. S. C. § 1397 *et seq.,* and, if the State chooses to adopt them, the optional programs of EA, defined in § 406 (e), and AFDC–Unemployed Parent (AFDC–U), established by § 407.

Section 402 (a) lists some 20 specific requirements for which a state plan "must provide." Some clearly apply to the plan as a whole. These generally concern program administration. *E. g.,* § 402 (a)(1) ("provide that it shall be in effect in all political subdivisions of the State); § 402 (a)(5) ("provide such methods of administration . . . as are found by the Secretary to be necessary and proper . . . ."); § 402 (a)(9) ("provide safeguards which restrict the use [or] disclosure of information concerning applicants or recipients . . . ."). Others, like § 402 (a)(10), refer specifically to "aid to families with dependent children." *E. g.*, § 402 (a)(7) ("provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children"); § 402 (a)(11) ("provide for prompt notice . . . to the State child support collection agency . . . of the furnishing of aid to families with dependent children to a child who has been deserted or abandoned . . . .").

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[16] The original plan actually invalidated in *Mandley I* narrowed EA eligibility by limiting it to persons also eligible (or presumptively eligible) for AFDC, and by recognizing as circumstances of emergency need only an AFDC recipient's loss of shelter due to damage or eviction, and an AFDC applicant's immediate need for household effects. Other States, however, have imposed different kinds of restrictions of EA eligibilty. Some, for example, *exclude* AFDC recipients if the emergency need is one theoretically covered by the basic assistance grant, reasoning that the State should not pay double benefits when recipients have failed to budget their resources properly. See generally Note, Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families with Children, 60 Cornell L. Rev. 879, 888–892 (1975).

The injunction ordered by the Court of Appeals in *Mandley II* apparently reaches all such limitations. It requires Illinois, so long as it receives any funds under Title IV–A and operates an emergency aid program, to provide assistance to all persons who fit within the federal description of eligible individuals, and it prohibits HEW from "approving state plans for emergency assistance which limit eligibility more narrowly than § 406 (e)."

[17] By controlling these two elements, which determine actual payments under the program, every State retains the ability to control its total AFDC expenditures. Cf. *Jefferson* v *Hackney,* 406 U. S. 535, 539–541.

The term "aid to families with dependent children" is given a very specific meaning in § 406 (b)—and "emergency assistance to needy families with children" as defined in § 406 (e) means, as we have observed, something quite different. It is true that both the EA and AFDC programs must be reflected in a State's § 402 plan, and both will be governed by those parts of § 402 that apply to the plan as a whole. But there is no basis for assuming that, when § 402 refers specifically to AFDC, those references are either meaningless or inadvertent. On the contrary, there is every reason to suppose that the exclusion of EA from specific substantive requirements of § 402, in particular § 402 (a)(10)'s imposition of mandatory eligibility standards, was deliberate, since the absence of mandatory eligibility standards is wholly consistent with the nature and purpose of the EA program.

B

The EA program was adopted by means of an amendment to § 406 defining the new term "emergency assistance to needy families with children." Pub. L. 90–248, § 206 (b), 81 Stat. 893. But nowhere in the EA statute is there a precise definition of eligibility comparable to the terms that have been held mandatory in AFDC. As to the latter, the term "aid to families with dependent children" is defined in § 406 (b) as "money payments . . . in behalf of [a] dependent child . . . ." The term "dependent child" is separately defined in § 406 (a) as a needy child who has been deprived of parental support, is living with specified relatives, and is either under the age of 18 or under the age of 21 and regularly attending school. It is this very specific definition of "dependent child" in § 406 (a) that has been held to be mandatory upon the States in *King* v. *Smith*, *supra* ("deprived of parental support"), *Carleson* v. *Remillard*, *supra* ("continued absence from the home") and *Townsend* v. *Swank*, *supra* ("regularly attending a school").

On the other hand, the term "emergency aid to needy families with children" is defined in § 406 (e) as payments and services furnished "in the case of a needy child" who meets certain requirements and is facing destitution. The structure of this statutory provision thus parallels § 406 (b)—*i. e.*, while it describes eligible persons, it is in terms a definition of the *program* for which federal funding is available. But in the EA program there is no separate provision, parallel to § 406 (a), that defines the terms used to describe eligible persons.[18] There is no statutory language, therefore, that can reasonably be understood as imposing uniform standards of eligibility on every state EA program.[19]

The conclusion that Congress in fact intended to treat EA and AFDC quite differently is fully consistent with its purposes in enacting the EA program. Unlike the basic AFDC program and the optional AFDC–U extension, EA is not a comprehensive system of income maintenance, but rather a program designed to allow quick, ad hoc responses to immediate needs. Indeed one of the primary purposes of making EA available to persons not receiving or eligible for AFDC was to "encourage[e] the States to move quickly in family crises, supplying the family promptly with appropriate services," in the hope that this "would in many cases preclude the necessity for the family having to go on [AFDC] assistance on a more or less permanent basis." 113 Cong. Rec. 23054 (1967) (Remarks of Cong. Mills). This purpose reflects not only an awareness of the distinct difference between AFDC and EA, but also an understanding that EA would not be surrounded with all of the trappings that § 402 requires of the on-going AFDC cash-payments program. In short, EA was designed "to assure needed care for children, to focus maximum effort on self-support by families, and to provide *more flexible and appropriate tools to accomplish these objectives.*" S. Rep. No. 744, *supra*, p. 165. (Emphasis supplied.)

As a matter of historical fact, Congress has always left the States broad discretion in shaping the programs that, like EA, authorize assistance to persons not eligible for AFDC in the hope of preventing lasting welfare dependency. Under the former § 406 (d) family services program[20] the States had "considerable latitude in providing services to nonwelfare recipients on the grounds that they [were] 'former or potential' recipients." S. Rep. No. 93–1356, p. 9 (1974). And the declared purpose of the new Title XX social services program enacted in 1975, 42 U. S. C. § 1397 *et seq.*, was to "encourag[e] each State, *as far as practicable under the conditions in that state* to furnish services directed at the goal of . . . achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency. . . ." 42 U. S. C. § 1397. (Emphasis supplied.) The legislative history of that statutory program reflects Congress' awareness that the very magnitude of its purpose would require that "the States . . . have the ultimate decision-making authority in fashioning their own social service programs within the limits of funding established by the Congress." S. Rep. No. 93–1356, *supra*, p. 6.[21]

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[18] By contrast, the other optional Title IV–A program, AFDC–U, is defined by reference to the key statutory term "dependent child." § 407 (a), 42 U. S. C. § 607 (a). This indicates that when Congress intended that a separate program should be treated in the same way" as AFDC, it was able to express that intent clearly by actually incorporating the identical terms.

[19] The Court of Appeals thought that "the problem of setting workable definitions for the somewhat amorphous eligibility criteria in [§ 406 (e) could] be addressed by HEW rule-making," *Mandley I*, *supra*, at 422–423, and indeed required such rulemaking in its *Mandley II* order. See n. 5, *supra*. The statute does not, however, require the Secretary to promulgate implementing regulations to clarify the scope of § 406 (e). Compare § 406 (e) with § 407 (a) (AFDC–U). Cf. *Batterton* v. *Francis*, 432 U. S. 416. And the regulations in fact adopted by the Secretary interpret the statute as leaving the States with broad discretion as to EA eligibility requirements. 45 CFR § 233.120. The Secretary's contemporaneous interpretation of the statute is entitled to considerable deference. *N. Y. Dept. of Social Services* v. *Dublino*, 413 U. S. 405, 421. In the absence of an express delegation of authority to the Secretary, there is simply no basis for assuming that Congress intended that he, rather than the States, must make definite—and mandatory—the generalized standards of eligibility it wrote into the EA statute. Cf. n. 21, *infra*.

[20] Section 406 (d) of the Act, as set forth in 42 U. S.C. § 606 (d), defined "family services" as "services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of the family to attain or retain capability for the maximum self-support and personal independence." Section 406 (d) has been repealed and replaced by the new Title XX Social Services program. Pub. L. 93–647, §§ 2, 3 (a)(5), 88 Stat. 2337, 2348. See 42 U. S. C. § 1397 *et seq.*

By the same token, the very breadth of the potential reach of EA—to virtually any family with needy children of a certain age that faces a risk of destitution—argues against the inference that Congress intended to require participating States to extend aid to *all* who were potentially eligible under § 406 (e). A literal application of all of the § 406 (e) standards, as required by the Court of Appeals' proposed order, would create an entirely open-ended program, not susceptible of meaningful fiscal or programmatic control by the States.

The Court of Appeals believed that under its interpretation of the Act Illinois would retain "substantial control" of its program through its ability to limit the amount of assistance actually paid:

> "It will be able to choose the level of benefits that it will provide and to set the standard of need. It may reasonably limit the amounts paid out in emergency assistance, *Dandridge* v. *Williams* [*supra*], but it will not be able to declare ineligible those who come within the federal definition of eligibility in [§ 406 (e)]. . . . This need not result in additional expense to the state but within existing appropriations should at least result in helping a broader number of persons, though more moderately than at present." *Mandley I, supra,* at 422–423.

But this application of the distinction drawn in the AFDC cases between eligibility criteria and financial need standards, see *ante,* at ——, fundamentally misconceives the purpose of the EA program. A family that is facing destitution because its home has burned down is not helped at all by a "moderate" grant insufficient to see it through the crisis. As the Illinois Director of the Department of Public Aid stated in his report to the Legislative Advisory Committee on Public Aid, the decision in *Mandley I* created an untenable tension between fiscal and programmatic integrity in the EA system:

> "But even if the Department could so limit [expenditures as suggested by the Court of Appeals] the results would be to divide a limited amount of Emergency Assistance money among a very expanded group of individuals, thus reducing the amount of assistance paid in each individual case to a meaninglessly small amount. The agency is thus faced with the prospect, if it continues the program, of potentially unlimited financial expenses, if it meets actual need in Emergency Assistance payments, or the payment of meaninglessly small amounts (and the possibility of legal challenge and subsequent mandatory order of additional financial payments)."

The intent of Congress in enacting EA thus would not be furthered by a statutory interpretation that requires a State to meet less than what it believes is the actual emergency need of an eligible family in order to retain financial control of its program. On the other hand, that intent will be effectuated by the natural reading we give to the relevant statutory provisions. Neither § 402 (a)(10), which makes *AFDC* eligibility criteria mandatory, nor § 406 (e), which defines the *permissible* scope of an EA program for purposes of federal funding, imposes mandatory eligibility standards on States that elect to participate in the EA program.

For the foregoing reasons the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[22]

It is so ordered.

Mr. Justice Blackmun took no part in the consideration or decision of these cases.

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No. 76–1410

Joseph V. Agosto, Petitioner,
v.
Immigration and Naturalization Service.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 6, 1978]

Syllabus

The Immigration and Naturalization Service brought proceedings to deport petitioner as an alien who had unlawfully entered the United States. At a series of hearings before an Immigration Judge, the INS presented documentary evidence that petitioner was born in Italy in 1927 of unknown parents, was placed in a foundling home there, and ultimately was adopted by an Italian couple. Petitioner and several other witnesses testified that he was born in Ohio of an Italian mother and sent to Italy at an early age to reside with the above couple. Rejecting petitioner's evidence, the Immigration Judge issued a deportation order, and the Board of Immigration Appeals affirmed. Petitioner then petitioned the Court of Appeals for review of the Board's decision, claiming that he was entitled to a *de novo* hearing in district court pursuant to § 106 (a)(5)(B) of the Immigration and Nationality Act, which provides that whenever a petitioner seeking review of a deportation order claims to be a United States citizen and makes a showing that his claim is not frivolous, the court of appeals, if it finds that "a genuine issue of material fact as to the petitioner's nationality is presented," must transfer the proceedings to the district court for a hearing *de novo* of the nationality claim. The Court of Appeals refused to transfer the case to the District Court for a *de novo* hearing and affirmed the deportation order, apparently holding that in order to obtain a *de novo* hearing petitioner was required by *Kessler* v. *Strecker*, 307 U. S. 22, to present "substantial evidence" in support of his citizenship claim and that he had failed to do so. *Held:*

1. The Court of Appeals' decision, to the extent that it holds *de novo* review to be required only where the petitioner presents substantial evidence in support of his claim to citizenship, is contrary to the plain language and clear meaning of § 106 (a)(5)(B), and there is nothing in the legislative history to indicate that Congress intended to require *de novo* judicial determination of citizenship claims only when such determinations would be compelled by the *Kessler* "substantial evidence" standard.

(a) Although § 106 (a)(5)(B) was intended to satisfy any constitutional requirements relating to *de novo* judicial determination of citizenship claims, the statute clearly does not restrict *de novo* review to cases in which the "substantial evidence" test is met. Rather than incorporating the language of *Kessler* in the statute, Congress chose to require hearings where there is "a genuine issue of material fact," thus incorporating the same standard as governs summary judgment motions under Fed. Rule Civ. Proc. 56.

(b) Since summary judgment principles control, it follows that a court of appeals cannot refuse to allow a *de novo* review of a citizenship claim if the supporting evidence would suffice to entitle a litigant to trial were such evidence presented in opposition to a motion for summary judgment.

2. Applying the appropriate standard to the record in this case, it is apparent that the Court of Appeals erred when it failed to transfer the

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[21] This conclusion was based on the "lengthy history of legislative and regulatory action in the social service area [which] made it clear . . . that the Department of Health, Education and Welfare can neither mandate meaningful programs nor impose effective controls upon the States." S. Rep. No. 93–1356, p. 6.

[22] The Court of Appeals did not reach the respondents' constitutional and state-law claims, see n. 3, *supra*. They remain open for consideration on remand.

case to the District Court for a *de novo* hearing. While the INS's documentary evidence would suffice, if uncontradicted, to establish petitioner's birth in Italy, such evidence would be refuted by petitioner's witnesses' testimony if that testimony were accepted by the trier of fact. Hence there is a genuine issue of material fact for the District Court on the question of petitioner's citizenship.

549 F. 2d 806, reversed and remanded.

Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, White, Blackmun, and Stevens, JJ., joined. Powell, J., filed a dissenting opinion, in which Rehnquist, J., joined.

Mr. Justice Marshall delivered the opinion of the Court.

The question for decision is whether petitioner has made a sufficient showing in support of his claim to United States citizenship to entitle him to a *de novo* judicial determination of that claim under § 106 (a)(5)(B) of the Immigration and Nationality Act, 8 U. S. C. § 1105a (a)(5)(B).

I

In 1967, the Immigration and Naturalization Service began deportation proceedings against petitioner by issuance of a show-cause order charging that he was deportable as an alien who had unlawfully entered the United States. App. 4–6. Petitioner, Joseph Agosto, opposed deportation, claiming that he was born in this country and therefore is a citizen of the United States not subject to deportation. Over the course of several years, a series of hearings were held before an immigration judge,[1] at which the Service presented documentary evidence in an effort to show that petitioner was born in Italy in 1927 of unknown parents, placed in a foundling home there, and ultimately adopted by an Italian couple. Petitioner presented testimony from himself and several other witnesses to show that he was born in Ohio of an Italian mother and sent to Italy at an early age to reside with the aforementioned couple.

In April 1973, the immigration judge issued the deportation order challenged here, rejecting the evidence tendered by petitioner and his witnesses that he was born in the United States. App. 23–59. The Board of Immigration Appeals affirmed. It noted that "[i]f believed, the testimony of [petitioner's witnesses] clearly refutes the Service's otherwise strong documentary demonstration of [petitioner's] alienage" and that "[i]t is not beyond the realm of possibility that [petitioner's] claim to United States citizenship is legitimate." Pet. for Cert. viii. The Board nevertheless accepted the immigration judge's credibility determinations and found that the "Service's case as to alienage is clear, convincing and unequivocal." Pet. for Cert. xi.

Agosto petitioned for review of the Board's decision in the United States Court of Appeals for the Ninth Circuit pursuant to § 106 of the Act, and claimed that pursuant to § 106 (a)(5), he was entitled to a *de novo* hearing in district court to determine whether he was a United States citizen. Section 106 (a)(5) provides that, whenever a petitioner "claims to be a national of the United States and makes a showing that his claim is not frivolous," the court of appeals is to transfer the proceedings to the district court for a hearing on that claim if "a genuine issue of material fact as to the petitioner's nationality is presented." When no genuine issue of material fact is presented, the court of appeals has authority to "pass upon the issues presented."[2]

The Court of Appeals, with one judge dissenting, refused to transfer the case to the District Court for a *de novo* hearing on petitioner's citizenship claim, and affirmed the deportation order. Pet. for Cert. i. It held that "[t]he evidence presented to the immigration judge does not disclose a colorable claim to United States nationality." *Id.*, at ii. Further, the Court of Appeals apparently concluded that in order to obtain a *de novo* hearing petitioner was required to present "substantial evidence" in support of his citizenship claim and that he had failed to do so. *Ibid.* The dissenting judge, while acknowledging that as a factfinder she would not have credited petitioner's testimony, stated that "I do not believe our legally assigned role includes a decision on credibility, and, on that basis, I am unable to say that petitioner's evidence, if believed, would not present a colorable claim to American citizenship." *Ibid.*

We granted certiorari, — U. S. — (1977), to consider the proper construction of § 106 (a)(5)(B), and we now reverse.

II

In 1961, Congress enacted § 106 of the Immigration and Nationality Act, 8 U. S. C. § 1105a, in order "to create a single, separate, statutory form of judicial review of administrative orders for the deportation . . . of aliens from the United States." H. R. Rep. No. 1086, 87th Cong., 1st Sess., 22 (1961).[3] This statutory provision eliminated district court review of deportation orders under § 10 of the Administrative Procedure Act, 5 U. S. C. § 702, and replaced it with direct review in the courts of appeals based on the administrative record. Congress carved out one class of cases, however, where *de novo* review in district court would be available: cases in which the person subject to deportation claims to be a United States citizen.

In carving out this class of cases, Congress was aware of our past decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings. See H. R. Rep. No. 1086, *supra*, at 29; H. R. Rep. No. 565, 87th Cong., 1st Sess., 15 (1961). In *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922), the Court observed:

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[1] After petitioner's first set of hearings, an immigration judge issued a deportation order, App. 18, which petitioner then appealed to the Board of Immigration Appeals. The Board remanded to permit the immigration judge to consider petitioner's claim that he was entitled to relief from deportation pursuant to § 241 (f), 8 U. S. C. § 1251 (f) as the husband of a United States citizen, but did not consider petitioner's other challenges to the finding that he was deportable. App. 19–20. At the hearing on remand, the Service lodged an additional charge against petitioner alleging that he was deportable because he had been convicted of crimes of moral turpitude. The immigration judge adhered to his finding that petitioner was deportable and not entitled to relief under § 241 (f). R. 677–691. On petitioner's second appeal, the Board again remanded for a further determination of petitioner's eligibility for § 241 (f) relief and to permit petitioner to produce certain witnesses in support of his claim to United States citizenship. R. 628–633. The deportation order challenged here was issued after petitioner's third set of hearings, App. 23–59, and the Board affirmed the order. Pet. for Cert. iv–xiii.

[2] Section 106 (a)(5), 8 U. S. C. § 1105a (a)(5), provides:

"[W]henever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503 (a) of this title or otherwise[.]"

[3] Prior to 1961, there was no specific statutory authorization for judicial review of deportation orders. For many years, habeas corpus had been the exclusive judicial remedy for challenging such orders, see *Heikkila* v. *Barber*, 345 U. S. 229, 235 (1953), but in 1955, we held that aliens could also obtain review of deportation orders in actions for declaratory and injunctive relief in district court under § 10 of the Administrative Procedure Act, 5 U. S. C. § 702, *Shaughnessy* v. *Pedreiro*, 349 U. S. 48.

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. . . . To deport one who . . . claims to be a citizen, obviously deprives him of liberty, . . . [and] may result also in loss of both property and life; or of all that makes life worth living."

We therefore held that a resident of this country has a right to *de novo* judicial determination of a claim to United States citizenship which is supported "by evidence sufficient, if believed, to entitle [him] to a finding of citizenship." 259 U. S., at 282. See also *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 152–153 (1923). In *Kessler* v. *Strecker,* 307 U. S. 22, 34–35 (1939), we reaffirmed that holding and indicated in dictum that judicial determination of citizenship claims is required where "substantial evidence" is presented to support the citizenship claim.

In the instant case, the court below stated that petitioner failed to satisfy the standard of *Kessler* v. *Strecker, supra;* the court thus implicitly held that the standard of "substantial evidence" had been incorporated into § 106 (a)(5)(B). Pet. for Cert. ii. We disagree. Although Congress intended § 106 (a)(5) to satisfy any constitutional requirements relating to *de novo* judicial determination of citizenship claims, *supra,* the statute clearly does not restrict *de novo* review to cases in which the "substantial evidence" test is met. Rather than incorporating the specific language of *Kessler* into the statute, as it easily could have done, Congress chose instead to require hearings where there is "a genuine issue of material fact"—a standard that is different from but as familiar as the substantial evidence standard.[4]

This statutory language is virtually identical to that embodied in Fed. Rule Civ. Proc. 56, which governs summary judgment motions. Under Rule 56, district court litigants opposing summary judgment have a right to a trial whenever there exists a "genuine issue as to any material fact." We may reasonably assume that, in using the language from Rule 56 as the standard for granting *de novo* district court hearings on citizenship claims, Congress intended the language to be interpreted similarly to that in Rule 56. " '[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.' " *Lorillard* v. *Pons,* — U. S. —, — (1978), quoting *Standard Oil* v. *United States,* 221 U. S. 1, 59 (1911). The Court of Appeals decision in this case, to the extent that it holds *de novo* review to be required only where the petitioner presents substantial evidence in support of his claim to citizenship,[5] is thus contrary to the plain language and clear meaning of the statute.[6]

Nor does anything in the legislative history indicate that Congress intended to require *de novo* judicial determination of citizenship claims only when such determinations would be compelled by the *Kessler* "substantial evidence" standard. Although there are references in the legislative history suggesting that a claim to citizenship must itself be "substantial," these statements are not amenable to the interpretation that substantial evidence is required in support of the claim before a judicial hearing would be provided. See, *e. g.,* H. R. Rep. No. 1086, *supra,* at 29; H. R. Rep. No. 565, *supra,* at 5. While Congress in enacting § 106 sought to "expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts," *Foti* v. *Immigration and Naturalization Service,* 375 U. S. 216, 226 (1963), this concern hardly justifies the assumption that Congress intended to impose a steep hurdle to judicial determination of citizenship claims. None of the abuses of judicial review catalogued by Congress in the Committee Reports related to citizenship claims. See H. R. Rep. No. 565, *supra,* at 7–13. Rather, Congress was primarily concerned with the filing of repetitive petitions for review and with frivolous claims of impropriety in the deportation proceedings.[7] See, *e. g.,* H. R. Rep. No. 1086, *supra,* at 23, 33; 107 Cong. Rec. 19650 (1961) (remarks of Sen. Eastland); 105 Cong. Rec. 12724 (1959) (remarks of Rep. Walter).

Since summary judgment principles are controlling here, it follows that a court of appeals cannot refuse to allow a *de novo* review of a citizenship claim if the evidence presented in support of the claim would be sufficient to entitle a litigant to trial were such evidence presented in opposition to a motion for summary judgment. More specifically, just as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U. S. 464, 627–628 (1944); 6 Moore, Federal Practice ¶ 56.02 [10], at 56–45 (2d ed. 1976), so too a court of appeals is not at liberty to deny an individual a *de novo* hearing on his claim of citizenship because of the court's assessment of the credibility of the evidence, see *Pignatello* v. *Attorney General of the United States,* 350 F. 2d 719, 723 (CA2 1965). Particularly where the evidence consists of the testimony of live witnesses concerning material factual issues, it will seldom if ever be appropriate to deny a *de novo* hearing, since "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Poller* v. *Columbia Broadcasting System, Inc., supra,* 368 U. S., at 473.

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[4] In addition to showing the existence of a "genuine issue of material fact" as to his nationality, a petitioner must demonstrate that his citizenship claim is not "frivolous" to obtain a *de novo hearing.* § 106 (a)(5). The "frivolousness" standard apparently refers to the merits of the legal theory underlying the citizenship claim. A "frivolous" claim would be analogous to one that could not survive a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. Rule Civ. Proc. 12 (b)(6). No one has suggested that the legal theory underlying petitioner's claim to American citizenship—that he was born in this country—is frivolous.

[5] In addition to holding that petitioner had not satisfied the standard of *Kessler* v. *Strecker, supra,* the Court of Appeals held that petitioner had not made a "colorable" claim to United States citizenship. The dissenting judge stated that she was unable to say that petitioner's claim was not "colorable." The term "colorable" appears nowhere in the statute, and neither opinion hints at its derivation. We cannot tell whether by use of the word "colorable," the Court of Appeals was applying the proper standard as set forth in § 106 (a)(5); if it was applying that standard, we believe it did so erroneously. See Part III, *infra.*

[6] None of the other Courts of Appeals to apply the standard have held that "substantial evidence" is necessary to trigger *de novo* review under § 106 (a)(5)(B). Instead, they have all indicated, although with some variation in language, that the appropriate standard is whether there is a genuine issue of material fact as to petitioner's alienage. See *Olvera* v. *Immigration & Naturalization Service,* 504 F. 2d 1372, 1375 (CA5 1974); *Rassano* v. *Immigration & Naturalization Service,* 377 F. 2d 971, 972 (CA7 1966); *Maroon* v. *Immigration & Naturalization Service,* 364 F. 2d 982, 989 (CA8 1966); *Pignatello* v. *Attorney General of the United States,* 350 F. 2d 719, 723 (CA2 1965).

[7] Section 106 was designed to minimize dilatory and repetitious litigation of deportation orders in several key respects. First, § 106 (c) precludes consideration of petitions for review or for habeas corpus where the validity of the deportation order "has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order." 8 U. S. C. § 1105a (c). Second, § 106 (a)(1) mandates that all petitions for review must be filed within six months of the date of the final deportation order. 8 U. S. C. § 1105a (a)(1). Finally, the statutory review proceeding replaces review in the district court under § 10 of the Administrative Procedure Act, 5 U. S. C. § 702, with review directly in the courts of appeals. 8 U. S. C. § 1105a (a). See p. 4, *supra.*

III

Applying the appropriate standard to the record in this case, it is apparent that the Court of Appeals erred when it failed to transfer the case to the District Court for a *de novo* hearing. The Service's proof that petitioner is not a United States citizen would certainly be sufficient, if uncontradicted, to establish his birth in Agrigento, Italy in July 1927. However, the evidence adduced by petitioner to support his claim of American citizenship creates "genuine issue[s] of material fact" that can only be resolved in a *de novo* hearing in the District Court.

Petitioner acknowledges that the Service's documentary proof pertains to him. This proof includes an entry from the City of Agrigento Registry of Births for 1927 relating that a 75-year-old handywoman appeared before the registrar and declared that "at 4:00 a. m. on the 17th day of [July] in a house situated in Via Oblati, of a woman who does not want to be named, a male child was born, which she presents to me and to whom she gives the first name of Vincenzo and the surname of Di Paola." R. 667. The city registry also indicates that the child was sent to a foundling home. In addition, the foundling home's registry indicates that a Vincenzo Di Paola was born on July 16, 1927 and was consigned to Crocifissa Porello, petitioner's adoptive mother and wife of Pietro Pianetti, petitioner's adoptive father, on August 26, 1927. The last piece of documentary evidence is a translation from the foundling home record showing that Vincenzo Di Paola was baptised on July 18, 1927.

Petitioner claims, however, that the records regarding Vincenzo Di Paola were made at the request of his maternal grandfather to hide the true facts of his illegitimate birth in the United States. Petitioner's evidence in support of his claim to United States citizenship consisted of his own testimony and that of his adoptive parents, Crocifessa and Pietro Pianetti, and his alleged half-brother, Carmen Ripolino.

According to the testimony of the Pianettis, petitioner was the illegitimate son of Crocifessa Pianetti's sister, Angela Porello, who left her Italian husband and two daughters in 1921 to move to the United States with her cousin Giacamo Ripolino. Through correspondence with Angela, the Pianettis learned in about 1925 that petitioner had been born, that his father was Salvatore Agosto, and that Angela had at least two other children, including Carmen Ripolino. According to the Pianettis, petitioner was sent to live with them and with Angela's parents because Angela could not care for petitioner in Ohio. The Pianettis testified that petitioner was never in the foundling home, but that the documents presented by the Service concerning petitioner's birth in Italy were created by Angela's father to hide the fact that petitioner was his illegitimate grandson.[8]

Carmen Ripolino corroborated the testimony of the Pianettis in important respects. He testified that his mother was Angela Porello, and that she told him when he was a child that he had two half sisters in Italy and a half brother whom she had sent there to live with her mother. Although Carmen Ripolino admitted having no independent knowledge that petitioner was the brother who had been sent to Italy, his testimony corroborated that of the Pianettis that Angela Porello gave birth to a son in this country whom she sent to Italy to live with relatives.

Petitioner's testimony was only partially consistent with that of his witnesses. Because he possessed a birth certificate belonging to one Joseph Agosto, born in Cleveland in 1921, which had allegedly been sent to petitioner in Italy by another American relative between 1948 and 1950, petitioner maintained for a time that he was that Joseph Agosto, the son of Salvatore Agosto and his wife Carmela Todaro.[9] The birth certificate had not actually been issued, however, until sometime after petitioner claimed to have received it. At the same time petitioner also testified that he had been told that his mother's name was Angela Porello and that he lived with his grandfather and the Pianettis after coming to Italy as a small boy. Petitioner acknowledged that he had been known by different names at different times.

There is no doubt that petitioner has not told one story consistently throughout his deportation hearings and has attempted to establish his citizenship by relying on any possible shred of evidence. Nor is there any doubt that petitioner has told different stories about his past to different courts.[10] But it is noteworthy that, starting in his first deportation hearing, petitioner has acknowledged that he is not certain of his true parental origins, and that he had been told that his mother was Angela Porello. And given the obvious confusion and uncertainty surrounding the circumstances of petitioner's birth (under either the Government's theory or that of petitioner), it is hardly surprising that petitioner cannot say with any degree of certainty who his true parents might have been.

We need not decide whether petitioner's testimony, standing alone, is so inherently incredible in light of its internal inconsistencies as to justify denial of *de novo* judicial review of the citizenship claim. In this case, the citizenship claim is supported by the testimony of three witnesses whose story, while highly unusual, certainly cannot be rejected as a matter of law. Their disputed testimony concerning petitioner's birth in this country and subsequent upbringing in Italy is in most respects no more unusual than their unchallenged testimony concerning other aspects of this family's relations.[11] To accept the present claim to United States citizenship, the District Court would need only to believe that petitioner was born to Angela Porello in Ohio in the mid-1920s; that he was sent by her to live with the Pianettis in Italy; and that Angela's father had the birth records in his native town falsified to prevent public knowledge of the birth of an illegitimate child to his daughter while still permitting him and other members of his family to raise the child.[12] These events, while out of the ordinary, are not so extraordinary as to compel disbelief in their occurrence. Even the Board of Immigration Appeals, which rejected petitioner's claim of citizenship, stated that "[i]t is not beyond the realm of possibility that [petitioner's] claim to United States citizenship is legitimate." Pet. for Cert. viii.

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[8] Petitioner and the Pianettis testified that the name Vincenzo Di Paola was probably chosen because July 17 was the feast day for Saint Vincent.

[9] Salvatore Agosto was sometimes referred to in the deportation proceedings as Arcangelo Agosto. Petitioner claimed they were different names for the same man who used one name with his wife, Carmela Todaro, and one name with Angela Porello.

[10] Petitioner maintained, in connection with a suit to declare his third wife his lawful wife, that he had been only 17 at the time of an earlier marriage in 1944, though in the deportation proceedings he claimed to have been born no later than 1925. In an effort to obtain leniency at his sentencing for falsification of papers in connection with a Federal Housing Administration loan, petitioner permitted his attorney to represent to the court that petitioner had no prior convictions, even though he did at that time have a criminal record in Italy.

[11] For example, Carmen Ripolino testified that he did not know who his father was, and that he had two birth certificates, one showing his father as Giacomo Ripolino (the man who brought Angela Porello to this country) and a second showing his father to be one Charles Litizia. In addition, the Pianettis testified to the varied relationships Mrs. Pianetti's sister, Angela Porello, maintained with different men and to her departure from Italy with one of those men, leaving behind a husband and two daughters. Although the Service may not have challenged this other testimony because it was immaterial to the issue of petitioner's citizenship, its lack of materiality and its unflattering character also suggest that the witnesses would have had no reason to testify to those events if they had not occurred.

[12] Since only the registrar signed the entry in the Registry of Births regarding the birth of Vincenzo Di Paola and the witnesses who were present were unable to write and only had the document read to them, it is certainly not entirely implausible that Angela's father was able to have that record and the notation at the foundling home falsified.

Since the documentary evidence submitted by the Service would be refuted by the testimony of petitioner's witnesses if that testimony were accepted by the trier of fact, *ibid.*, there is plainly a genuine issue of material fact for the District Court on the question of petitioner's citizenship. Although as the trier of fact the District Court might reject the testimony of these witnesses because of their interest in the outcome, that determination has been committed by Congress to the district courts by § 106 (a)(5)(B) of the Act and not to the courts of appeals. The decision of the Court of Appeals must therefore be reversed and the case remanded for proceedings consistent with this opinion.

Reversed.

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Court today has construed a statute in a way that rewards falsehood and frustrates justice. The statute is § 106 (a) of the Immigration and Naturalization Act, 8 U. S. C. § 1105a (a), adopted in 1961 as part of a general revision of the statutory provisions governing judicial review of deportation orders. The general revision was designed to prevent repetitious litigation of frivolous claims, and "dilatory tactics" used to forestall deportation, by eliminating in most instances any review by district courts of deportation decisions. *Foti* v. *Immigration & Naturalization Service*, 375 U. S. 217, 224–225 (1963).[1]

The general rule under § 106 (a) leaves deportation matters largely to administrative proceedings, subject to review by a court of appeals to ensure that the administrative decision is supported by "reasonable, substantial, and probative evidence on the record considered as a whole." 8 U. S. C. § 1105a (a)(4). Section 106 (a)(5), quoted *ante*, at 3 n. 2, provides a narrow exception to the general rule when the deportation proceeding involves a person claiming to be a national of the United States. In such a proceeding, § 106 (a)(5) requires a reviewing court of appeals to refer the case to a district court for a *de novo* trial when the claimant clears two hurdles: first he must show that his claim to United States citizenship is not "frivolous," and then that its resolution turns on "a genuine issue of material fact." As indicated in the Court's opinion, the statute is hardly a model of artful draftsmanship. Even so, it is unnecessary to construe it, as the Court does, to require a trial *de novo* in federal district court in response to any asserted claim to citizenship turning on questions of "credibility," however far-fetched.

There can be no case less deserving of further factual review than this one. Petitioner is an ex-convict, convicted of several crimes involving moral turpitude. He has told five different stories with respect to his nationality, inventing new fabrications to meet the Service's evidence or whenever they served other purposes. See *ante*, at 11 n. 10. No one has believed his stories. Yet he has proved himself a master at exploiting the safeguards designed to vindicate bona fide—not specious—claims of citizenship. The Court's holding totally frustrates the intent of Congress in enacting § 106 (a), in response to the "growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country." H. R. Rep. No. 1086, 87th Cong., 1st Sess., 22–23 (1961). Rather than putting an end to this abuse of our generous procedures, the Court now concludes that petitioner is entitled to a *de novo* trial of a claim to citizenship so transparently false that none of the numerous judges who have passed on it believes it.

I

The Immigration Service claims that petitioner is an Italian by birth named Vincenzo Di Paola Pianetti, and that he is deportable because his most recent entry into the United States was fraudulent and because he has been convicted of crimes involving moral turpitude. The Service claims that petitioner last entered the United States in 1966, purporting to be a citizen of the United States and relying on the passport of Joseph Agosto. Petitioner claims he was born in Cleveland, Ohio, assigning various dates of birth from 1921 to 1927, and was named Joseph Agosto; that he was sent to Italy when he was two or three years old; that he lived there with his natural mother's sister and her husband, who later "affiliated" him and gave him their name; and that he returned to the United States in 1951 or 1952. The issue ultimately is one of identity. If petitioner is "Agosto" rather than "Pianetti," he is an American citizen. During the course of the instant proceedings, commenced in 1967, not a single administrative or judicial official has believed that petitioner is not the Italian-born Pianetti.

The proceedings in this case have been protracted. On September 5, 1967, the Service issued a show cause order, and notice of hearing, seeking petitioner's deportation. A full hearing was held before an immigration judge. The Service introduced documentary evidence demonstrating that petitioner was born, taken to a foundling home, and baptised in Agrigento, Italy, in 1927, and later was entrusted to the Pianettis. See *ante*, at 8–9. The Service also demonstrated that petitioner was married to an Italian woman in 1944 and had two daughters in Italy. At this first hearing, petitioner conceded that the documentary evidence pertained to him, but claimed that he really had been born in Cleveland, Ohio, in 1921, and was named Joseph Agosto. Petitioner produced a marriage certificate showing that he was married in Alaska in 1953, and that he claimed at the time to be 32 years old and not previously married. Petitioner testified that he was sent to Italy when he was 4 or 5, and that his belief that he was born in Cleveland was based entirely on the birth certificate which an uncle sent him from the United States. The Service countered with documentary evidence that the birth certificate pertained to a Joseph Agosto who had been born in Cleveland in 1921 and died in Italy in 1951, and an affidavit from Joseph Agosto's sister that petitioner falsely was using the identity of her deceased brother.

The immigration judge sustained the charge of the Service and entered a deportation order. He concluded that petitioner "presented no credible evidence to show that he is not the person [Pianetti] whom the government claims him to be." App. 14. On appeal, the Board of Immigration Appeals remanded the proceedings, "without reviewing the case on its merits," for the immigration judge to consider petitioner's contention that he was nondeportable under § 241 (f) of the Act, 8 U. S. C. § 1251 (f), because of his marriage to an

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[1] "[B]y eliminating review in the district courts, the bill [was intended to] obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding." *Foti* v. *Immigration & Naturalization Service*, 375 U. S., at 225 n. 11 (quoting 104 Cong. Rec. 17173 (remarks of Rep. Walter)).

American citizen, Mary Marie Agosto.[2]

Following a second hearing, the immigration judge again found petitioner not a citizen, deportable (not only because he had entered the United States without inspection but also because he had been convicted of several crimes involving moral turpitude), and not entitled to relief under § 241 (f). Again petitioner appealed to the Board of Immigration Appeals. On this appeal petitioner conceded that a Joseph Agosto died in Italy in 1951, but maintained that there were "two Joseph Agostos," both born in Cleveland of the same father but different mothers. Petitioner explained the fact of only one birth certificate by saying that his mother had been the father's mistress and that the birth of the legitimate Joseph Agosto had not been recorded. The Board again declined to reach the merits of petitioner's claim to citizenship and remanded for consideration of "forgiveness" relief under § 241 (f).

It was not until the third hearing in 1971 that petitioner produced three witnesses, the couple who affiliated him in Italy and his supposed half-brother from Ohio, who testified in support of petitioner's claim to citizenship. Petitioner abandoned his other stories of birth in 1921 or 1927, and maintained that he was born in Cleveland in 1924, the son of the father of the Joseph Agosto who was born in 1921. On April 11, 1973, the immigration judge filed an exhaustive opinion concluding that all of petitioner's various and contradictory stories were fabrications. App. 23–59. The opinion characterized petitioner as having had, since "he was sixteen years of age, . . . a record of deceit, double-dealing and subterfuge." App. 32. The Board of Immigration Appeals affirmed. In the context of affirming the denial of discretionary relief from deportation, it observed that petitioner "knowingly gave false testimony before the immigration judge; his claim to citizenship has been knowingly false since its inception." Pet. for Cert. xii.

Having finally exhausted his administrative remedies, petitioner appealed to the United States Court of Appeals for the Ninth Circuit. That court issued its memorandum decision on January 24, 1977, and sustained the deportation decision, saying: "The evidence presented to the immigration judge does not disclose a colorable claim to United States nationality; nor does it meet the standard set forth in *Kessler* v. *Strecker*, 307 U. S. 22, 35 (1935)." Pet. for Cert. ii.

We granted certiorari on October 17, 1977. Today the Court hands down a decision entitling petitioner to continue his 11-year saga, commencing with a trial *de novo* in a district court.

II

The first flaw in the Court's reasoning is that it reads out of the statute the threshold requirement that the claim to United States nationality not be "frivolous." The Court muses in a footnote, without support, that "[t]he 'frivolousness' standard apparently refers to the merits of the legal theory underlying the citizenship claim," *ante*, at 5 n. 4, and therefore has been satisfied in this case because petitioner's theory of citizenship—that he was born in this country—is not frivolous.

Neither the language of the statute nor its legislative history sheds any helpful light on the intended meaning of the term "frivolous" for purposes of this statute.[3] The term may well refer in some instances to the underlying legal theory of a claim. But to say that this is the exclusive meaning is virtually to read the term out of the statute. If all that is required for a claim to be considered nonfrivolous is that the alleged alien maintain that he was born in this country, patently frivolous claims will pass the first threshold of the statute.[4] If Congress thought that every claim to birth in this country, however tenuous, merited judicial *trial* rather than judicial *review*, one would assume it would have so provided rather than create a dual system of *de novo* fact-finding by both administrative and judicial proceedings. In addition, the legal theory underlying *any* claim to citizenship almost always will be that the purported citizen was born or naturalized in the United States. According to the Court's theory, therefore, the underlying legal theory of a claim to citizenship rarely will be deemed "frivolous."

We normally construe statutes to give meaning to each of their components. I read Congress' intent to have been that the courts of appeals must examine the administrative record to determine whether a claim to citizenship is frivolous for any reason.[5] And it would be difficult to find a more frivolous claim to citizenship than this one.[6]

III

Assuming, *arguendo*, that petitioner's claim is not frivolous, the Court of Appeals was required to transfer the case to a district court for a *de novo* hearing only if it concluded that a "genuine issue of material fact" existed. The Court today, applying the standard governing summary judgment in the federal courts, concludes that a genuine issue of material fact exists here because "the citizenship claim is supported by the testimony of three witnesses whose story, while highly unusual, certainly cannot be rejected as a matter of law." *Ante*, at 11. The fallacy in this holding is twofold. First, it applies an erroneous standard. The Court assumes that Congress meant to import the summary judgment standard into an entirely different statutory scheme, simply because the same words appear in both contexts. While this is a superficially appealing approach, it abdicates our responsibility to construe the statute in light of its origin and purpose. The second flaw in the Court's holding lies in its incorrect application of the summary judgment standard itself.

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[2] On June 3, 1968, in connection with a friendly suit to have Mary Marie Agosto declared his legal wife, petitioner executed an affidavit which contradicted the story told at the first deportation hearing. The affidavit stated that petitioner was born in 1927, and therefore was only 17 when he married his Italian wife in 1944. This would have rendered his first marriage invalid and would have validated his American marriage.

[3] The origin of the term in this context seems to have been *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), where the Court articulated the constitutional requirement of a judicial hearng when the petitioner "claims citizenship and makes a showing that his claim is not frivolous. . . ." *Id.*, at 284. The threshold requirement that the claim not be frivolous was absent from one of the earlier drafts of § 106 (a) (5). See H. R. Rep. No. 2478, 85th Cong., 2d Sess., 1 (1958).

[4] Petitioner himself does not argue that a "frivolous" claim to citizenship can only be one whose underlying legal theory is frivolous. Petitioner's counsel conceded before us that if there were uncontested documentary evidence of birth in Italy and only the alien's sworn statement that he was born in the United States, "that would be a frivolous claim because [the hypothetical case] is really a bare assertion of citizenship without any evidentiary support at all." Tr. of Oral Arg. 10.

[5] The courts of appeals are accustomed to determining whether *in forma pauperis* appeals from denials of habeas corpus petitions are "frivolous," and therefore warrant dismissal, under 28 U. S. C. § 1915 (d). Whether such an appeal is considered "frivolous" may depend on either the legal theory or the facts of the case.

[6] In *Maroon* v. *Immigration & Naturalization Service*, 364 F. 2d 982 (CA8 1966), the alleged alien—somewhat like petitioner here—changed his story between the deportation proceedings and judicial review, in the face of solid contrary documentation offered by the Service. The Court of Appeals concluded: "In this situation, petitioner's present claim to be a national of the United States, wholly unsupported by any substantial evidence whatever, and utterly inconsistent with the documents admittedly executed by him, would appear to be *frivolous.*" *Id.*, at 989 (emphasis supplied).

A

Section 106 (a)(5) apparently was enacted in order to satisfy the constitutional requirement, first enunciated in *Ng Fung Ho* v. *White,* 259 U. S. 276 (1922), that a resident who claims to be a United States citizen and supports the claim with the requisite quantum of proof is entitled to a judicial determination of his claim to citizenship. *Id.,* at 282–285; see H. R. Rep. No. 1086, *supra,* at 29. The Court held that two of the petitioners in *Ng Fung Ho* were entitled to a *de novo* judicial determination of their citizenship claim because they "supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship."[7] 259 U. S., at 282.

The standard of proof required by *Ng Fung Ho* for a judicial hearing was restated in two later cases, both decided before the enactment of § 106 (a)(5). In *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149 (1923)—which, like *Ng Fung Ho,* was authored by Mr. Justice Brandeis—no claim to citizenship had been made. The Court observed, however, that "[i]f, in the deportation proceedings, Bilokumsky had claimed that he was a citizen *and had supported the claim by substantial evidence,* he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal." *Id.,* at 152 (citing *Ng Fung Ho, supra*) (emphasis supplied). *In Kessler* v. *Strecker,* 307 U. S. 22, 34–35 (1939), the Court again observed, citing *Bilokumsky,* that an alien is entitled to a trial *de novo* on a claim of citizenship if supported by "substantial evidence." It is clear, therefore, that the constitutional requirement of a *de novo* judicial hearing is triggered only if the person claiming citizenship provides some substantial evidentiary support for his claim.

The Court's conclusion that Congress intended to set a lower standard in § 106 (a)(5) is not supported by the legislative history. The Court acknowledges but disregards the fact that the House Reports antedating enactment of § 106 (a)(5) contain repeated references to "substantial" and "genuine" claims to citizenship. See *ante,* at 7; see also H. R. Rep. No. 1086, *supra,* at 28; H. R. Rep. No. 565, *supra,* at 13, 15. In each of these Reports the reference to "a substantial claim of U. S. nationality" immediately precedes the observation that the statute was meant to satisfy the constitutional requirement articulated in *Ng Fung Ho.*

In the face of this unequivocal evidence of legislative intent, the Court errs in concluding that Congress meant to depart from the evidentiary standard stated in *Ng Fung Ho,* as interpreted in *Bilokumsky* and *Kessler.* The Court then compounds its error by holding that § 106 (a)(5) places a court of appeals, in reviewing a decision of the Board of Immigration Appeals, in the position of a district court ruling upon a motion for summary judgment at the outset of a trial. Fed. Rule Civ. Proc. 56 (c). Although there is congruity in the "genuine issue of material fact" language, found in both § 106 (a)(5) and Rule 56 (c), there is a controlling difference in the settings in which this language is used.

In the usual civil trial, the summary judgment motion is entertained before any hearing has taken place. If sustained, it forecloses all opportunity for the opposing party to present his case before the finder of fact. Subject to appeal, a decision in favor of the movant in effect deprives his opponent of a trial on the facts. The situation to which § 106 (a)(5) applies simply is not comparable. That section is part of an elaborate administrative procedure in which a claimant may present fully his evidence to an immigration judge and then have it reviewed by the Board of Immigration Appeals. There is no summary judgment procedure under the Act and, consequently, no danger that a claimant will be denied a full evidentiary hearing. In this respect, the standard contained in § 106 (a)(5) is more like the standard governing directed verdicts, Fed. Rule Civ. Proc. 50, than summary judgments.[8]

Although the Court of Appeals in this case itself did not observe the witnesses who testified on petitioner's behalf, it was not required to ignore completely the unequivocal opinion of the immigration judge that petitioner's witnesses had been "coached as to their testimony," Pet. for Cert. viii; see App. 41, and that their stories were fabrications. Even if the Court of Appeals was not in as good a position to judge these matters as a judge ruling on a motion for directed verdict, neither was it as constricted as a judge ruling on a motion for summary judgment. As both motions are governed by the "genuine issue of material fact" standard, there is no reason to adopt the more restrictive but less appropriate analogy.[9]

This case illustrates forcefully the inappropriateness of the summary judgment analogy. Petitioner has had three evidentiary hearings before an immigration judge, three appellate reviews by the Board of Immigration Appeals, and one review each by the Ninth Circuit Court of Appeals and the United States Supreme Court. One normally would expect that at the end of this elaborate sequence of hearings and reviews, the case would be concluded. Instead, the Court launches petitioner's litigation anew, bowing to a form of words rather than the substance of justice. All that has occurred—the entire sequence of *eight* proceedings—is merely prologue. Petitioner's case now starts afresh in a district court in the same way that any civil litigation would commence. He is free to change his testimony—again—and to round up new witnesses who will swear to it. If he loses once more, he will have an appeal as of right to the Court of Appeals; from there, he may file another petition for certiorari. This additional round of proceedings probably will take several years. Meanwhile, petitioner will continue to enjoy the privileges of American citizenship that he has consistently abused.

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[7] In *Ng Fung Ho,* two of the petitioners' claims of citizenship apparently were not contradicted by independent evidence presented by the government. Rather, the petitioners had entered the United States lawfully, as the foreign-born sons of a naturalized United States citizen and therefore as citizens themselves, and had been issued "certificates of identity." Later, when immigration officials came to suspect perjury in the earlier proceedings, they sought to deport the petitioners. The petitioners argued in this Court that the immigration authorities had not presented any "real substantial evidence to support them in attempting . . . to set aside the former finding of American citizenship. . . ." Brief for Petitioners in *Ng Fung Ho* v. *White,* O. T. 1921, No. 176, p. 33. Thus the determination of citizenship in *Ng Fung Ho* depended entirely on whether the evidence of the petitioners was believed by the factfinder or disbelieved because of the Service's attempt to discredit it. Perhaps this explains the Court's use of the "sufficient, if believed" language.

[8] When a party moves for a directed verdict, he does so after the evidence is in. This is comparable to the situation confronting a Court of Appeals in a case like this. The formulation of the standard governing summary judgments and directed verdicts is the same with respect to the "genuine issue" rule: "Both motions . . . call upon the court to make basically the same determination—that there is no geninue issue of fact and that the moving party is entitled to prevail as a matter of law." 10 Wright & Miller, Federal Practice & Procedure § 2713, at 407 (1973). Yet a major difference between summary judgment and directed verdict is that credibility determinations may enter into the latter but not the former. Unlike a summary judgment motion, "a directed verdict motion typically would be made after the witness had testified and the court could take account of the possibility that he could not be disbelieved or believed by the jury." *Id.,* at 406.

[9] In addition, the Court substitutes its "genuine issue" standard for that used even by some of the courts of appeals in cases cited by the Court with approval. For example, in *Rassano* v. *Immigration & Naturalization Service,* 377 F. 2d 971 (CA7 1967), the petitioner and three supporting witnesses testified that the petitoner's father said he had been naturalized and that both father and son were citizens. They were unable to produce the naturalization papers or to testify that they had seen them. The court held that the evidence was insufficient to raise a genuine issue of material fact, in part because of the untrustworthiness of the testimony. While the *Rassano* court used the standard of "genuine issue of material fact," in conformity with the statutory language, it surely did not use the summary judgment standard endorsed by the Court today.

B

Even if one assumes with the Court that the summary judgment analogy is appropriate, today's decision still is untenable. Under Rule 56 (c) itself, there must be a degree of substantiality to the evidence proffered in opposition to a summary judgment motion if the motion is to be defeated. See *Firemen's Mutual Ins. Co.* v. *Aponaug Mfg. Co.*, 149 F. 2d 359, 362 (CA5 1945); *Whitaker* v. *Coleman*, 115 F. 2d 305, 306 (CA5 1940); 10 Wright & Miller, Federal Practice & Procedure § 2725, at 512 (1973); 6 J. Moore, Federal Practice ¶ 56.15 [4], at 56–521 (1976). See also *Maroon* v. *Immigration & Naturalization Service*, 364 F. 2d, at 989. A court never is required to accept evidence that is inherently incredible or "too incredible to be accepted by reasonable minds."[10] 6 J. Moore, *supra*. I believe petitioner's evidence reasonably cannot be viewed in any other light.[11]

In concluding that there is a "genuine issue of material fact" presented on this record, under the standard applicable to a summary judgment motion, the Court relies primarily on the testimony of petitioner's adoptive parents and supposed half-brother, presented for the first time at petitioner's *third* hearing before the immigration judge. In effect, the Court applies the summary judgment standard as if the *only* testimony on the record were that adduced at the third hearing. But if the summary judgment standard is to be applied, it is necessary to view the evidence submitted by petitioner in its totality—as if petitioner, in contesting a summary judgment motion, had submitted three sets of depositions containing precisely the same evidence presented by him at the three administrative hearings. A district court then would be confronted with three significantly different stories, each sworn to by petitioner, one belatedly corroborated by his coached kinsmen, and all of them contradicted by authenticated documentary evidence. I doubt that any district court would find petitioner's evidence sufficient, viewed in its totality, to defeat a motion for summary judgment.

IV

However one may read the unclear language of § 106 (a)(5), it is at least clear that Congress did not intend duplicate judicial proceedings to follow administrative proceedings simply upon demand. If all that § 106 (a)(5) requires is a swearing contest—even when the Government's case is predicated on documents whose authenticity is uncontested—then *every* subject of deportation proceedings has it within his power to circumvent the obvious intention of the statutory scheme to minimize dilatory tactics by deportable aliens. The Court today has opened wide this inviting door.

ROBERT S. BIXBY, San Francisco, Calif. (FALLON, HARGREAVES, BIXBY & McVEY, with him on the brief) for petitioner; MARION L. JETTON, Assistant to the Solicitor General (WADE H. McCREE, JR., Solicitor General, BENJAMIN R. CIVILETTI, Assistant Attorney General, JEROME M. FEIT, and JOHN H. BURNES, JR., Justice Department attorneys, with her on the brief) for respondent.

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[10] And while the facts must be viewed in the light most favorable to the party opposing summary judgment, this means no more than that "the party opposing a summary judgment motion is to be given the benefit of all *reasonable* doubts and inferences in determining whether a genuine issue exists that justifies proceeding to trial." 10 Wright & Miller, *supra*, at 510 (emphasis supplied).

[11] The Board of Immigration Appeals did say: "It is not beyond the realm of possibility that [petitioner's] claim to United States citizenship is legitimate." Pet. for Cert. viii. But the rest of the Board's statements place this one in perspective. Immediately following its acknowledgement that petitioner's claim was not demonstrably impossible, the Board observed that it would have to accept a number of illogical and unrealistic propositions in order to accept petitioner's most recent story. In essence, the Board made clear that the story could not be accepted by reasonable minds; and it concluded ultimately that petitioner's claim to citizenship "[had] been knowingly false since its inception." Pet. for Cert. xii.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2159

September Term, 19 83

Julius Hobson, et al.

v.

Jerry Wilson,
Thomas J. Herlihy,
Jack Acree,
Christopher Scrapper,
Edward Jagen,
John Mahaney &
George Suter,
Appellants

John B. Layton, et al.

AND CONSOLIDATED CASES

Civil Action 76-01326

Calendared for: 1-23-84

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 6 1984

GEORGE A. FISHER
CLERK

O R D E R

It is ORDERED, by the Court, sua sponte, that the following times are allotted for the oral argument of the above entitled cases:

District of Columbia Appellants/Cross-Appellees	-- 12 1/2 minutes
Brennan, Moore, Pangburn & Grimaldi Appellants/Cross-Appellees	-- 12 1/2 minutes
Jones Appellant/Cross-Appellee	-- 7 minutes
Hobson, et al. Appellees/Cross-Appellants	-- 35 minutes
District of Columbia	-- 4 minutes rebuttal
Brennan, et al.	-- 4 minutes rebuttal
Hobson, et al.	-- 5 minutes reply on cross-appeal issues

For the Court

GEORGE A. FISHER, Clerk

By: Patricia L. Chatman
Patricia L. Chatman
Deputy Clerk

qualified immunity
See esp. p. 17 n. 16, p. 22

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1626

BERTRAM ZWEIBON, et al., APPELLANTS

v.

JOHN N. MITCHELL, individually and as Attorney General of the United States, et al.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 71-02025)

Argued November 22, 1982

Decided October 21, 1983

Nathan Lewin, with whom *Jamie S. Gorelick* was on the brief, for appellants.

Larry Lee Gregg, Attorney, Department of Justice, with whom *Stanley S. Harris*, United States Attorney, and *Barbara L. Herwig*, Attorney, Department of Justice, were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: EDWARDS, *Circuit Judge*, MACKINNON, *Senior Circuit Judge*, and SWYGERT,* *Senior Circuit Judge*, United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

Dissenting opinion filed by *Senior Circuit Judge* SWYGERT.

MACKINNON, *Senior Circuit Judge*: This is our fourth foray into this protracted litigation. Past history notwithstanding, this decision should dispose of the matter.

Appellants, members of the Jewish Defense League (JDL), brought this action in 1971 against John N. Mitchell,[1] who as Attorney General authorized warrantless electronic surveillance of the JDL during 1970 and 1971. Appellants now challenge the district court's order, entered after our third remand, which dismissed their complaint pursuant to Fed. R. Civ. P. 37(b) for their refusal to comply with deposition notices. Because we find that Mitchell is entitled to qualified immunity under the Supreme Court's recent decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), we affirm the decision of the district court without reaching the question whether dismissal was an appropriate sanction.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Nine special agents of the Federal Bureau of Investigation were also named as defendants, but they were dismissed from the case in earlier proceedings and are not parties to this appeal. *See* Record of Status Call at 3 (Dec. 1, 1981) (IV App. 68). [References to the Joint Appendix filed with the briefs in this appeal are designated as "IV App." to distinguish that volume from appendices, also referred to herein (*e.g.*, "III App."), which were filed on previous appeals in this case.] For clarity, we refer to Mitchell throughout this opinion as the sole defendant to this action.

I. FACTUAL BACKGROUND

The facts of this case need only be sketched here, as they are set out in exhaustive detail in our opinion in *Zweibon v. Mitchell* (*Zweibon I*), 516 F.2d at 594 (D.C. Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976). In 1970 and 1971, the telephones of the JDL were tapped by the FBI, which acted without a warrant under a specific directive from Mitchell.[2] Mitchell, in turn, had responded to official requests for such authorization from J. Edgar Hoover, who adverted to Soviet complaints about sometimes violent JDL demonstrations against Soviet personnel and installations in New York.[3] Electronic surveillance was sought in order to forestall deterioration in American-Soviet relations and to avoid threatened retaliation against American citizens in Russia. *See id.* at 608-09 & nn.20-23; *Zweibon v. Mitchell,* 363 F. Supp. 936, 939-42 (D.D.C. 1973). Against the advice of his legal counselors,[4] Mitchell authorized the warrantless taps on September 15, 1970.[5]

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[2] A preexisting Presidential directive expressly delegated to the Attorney General responsibility and authority for exercising the President's putative authority to approve warrantless electronic surveillance in national security cases. *See* President Johnson's Memorandum for the Heads of Executive Departments and Agencies (June 30, 1965), *reproduced at Zweibon I,* 516 F.2d at 674-75, app. A.

[3] Hoover's memorandum is discussed in our opinion in *Zweibon I,* 516 F.2d at 609 n.24.

[4] *See* Memorandum from Assistant Attorney General J. Walter Yeagley, Internal Security Division, to the Attorney General at 4-5 (Apr. 1, 1969) (IV App. 20-21); Memorandum from the Solicitor General to the Attorney General at 7-8 (Apr. 3, 1969) (IV App. 28-29); Memorandum from the Solicitor General to the Attorney General at 2-5 (Apr. 7, 1969) (IV App. 35-38). *But see* Memorandum from Assistant Attorney General Will Wilson, Criminal Division, to the Attorney General at 1 (Apr. 15, 1969) (IV App. 40) (urging, without legal analysis, that "wiretaps involving . . . dangerous and violent internal subversion" be defended as constitutional).

[5] Mitchell's signed approval, dated September 15, 1970, was affixed to the bottom of Hoover's memorandum requesting

The first wiretap was in place during the month of October 1970. *Zweibon I*, 516 F.2d at 609. The volume of JDL protests increased during the last two months of 1970, and on January 4, 1971, Mitchell approved an official FBI request for authority to reinstitute surveillance for a period of 90 days. *Id.* at 609-10. Authority was extended for another 90 days on March 31, 1971. *See* Memorandum from J. Edgar Hoover to the Attorney General (Mar. 31, 1971) (III App. 72).

On May 12, 1971, indictments were returned against a number of JDL members—including five of the appellants in this action—on federal charges under the Gun Control Act of 1968.[6] Prosecutors disclosed the existence of the taps on June 18, 1971, during pretrial proceedings in two consolidated criminal cases stemming from the indictments.[7] In apparent violation of Mitchell's own directive against overhearing conversations of a federal criminal defendant or his attorney,[8] the taps continued after indictment and even after their disclosure by the prosecution.[9] There is, however, no evidence to suggest that

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the authorization. Memorandum from J. Edgar Hoover to the Attorney General at 2 (Sept. 14, 1969) (III App. 69).

[6] Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified at scattered sections of Titles 18 and 26 U.S.C.).

[7] These criminal cases are United States v. Bieber, No. 71-CR-479 (E.D.N.Y.), and United States v. Joffe, No. 71-CR-480 (E.D.N.Y.). The pretrial hearing is unreported. *Zweibon I*, 516 F.2d at 607 n.15.

[8] In a letter dated July 14, 1969, Mitchell had prohibited the overhearing of conversations of a federal criminal defendant or his attorney. *See Zweibon I*, 516 F.2d at 611 & n.34; Memorandum from J. Edgar Hoover to the Attorney General at 2 (Jan. 4, 1971) (III App. 71). Bertram Zweibon, who is lead plaintiff in this action, was a counsel of record in the criminal proceedings. *Zweibon I*, 516 F.2d at 611 n.33.

[9] Indictments were returned on May 12; the taps were revealed on June 18; and the surveillance was terminated on July 3. *See Zweibon I*, 516 F.2d at 605 n.10, 610 n.31.

Mitchell knew surveillance had not been terminated upon indictment as he had previously directed.[10] *See Zweibon I*, 516 F.2d at 610-11 & n.34.

II. PROCEDURAL HISTORY

Shortly after the surveillance was revealed, appellants filed this action for damages allegedly flowing from the overhearings. The taps were alleged to have violated appellants' rights under both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976). The action was promptly stayed pending the Supreme Court's decision in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972). On June 19, 1972, the Supreme Court decided *Keith*, holding that there exists no exception from the warrant requirement for surveillance justified solely on the basis of *domestic* threats to the national security. *Id.* at 321. The Court expressly left open, however, "the issues which may be involved with respect to activities of foreign powers or their agents," *id.* at 322 (footnote omitted), and it did not articulate precise definitions of "domestic" and "foreign" threats to national security. *See id.* at 309 n.8.

A year later, the district court granted Mitchell's motion for summary judgment. 363 F. Supp. 936 (D.D.C. 1973). The court distinguished *Keith* as "dealing only with the domestic aspects of our national security," *id.* at 943, and concluded that warrantless surveillance of the JDL was a lawful "exercise of the President's constitutional authority to conduct the nation's foreign rela-

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[10] In fact, Hoover's memorandum seeking the first 90-day authorization concluded with an express assurance that the requested "monitoring [would] be conducted in accordance with the instructions set forth in your letter of July 14, 1969, entitled 'Electronic Surveillances.'" Memorandum from J. Edgar Hoover to the Attorney General at 2 (Jan. 4, 1971) (III App. 71). Mitchell approved the request by signing immediately below this assertion. *Id.*

tions and his power to protect the national security." *Id.* at 942. The court also ruled that Title III of the Omnibus Crime Control and Safe Streets Act did not address itself to "national security surveillances" that have "foreign aspects." *Id.* at 943.

This court, sitting *en banc*, reversed. *Zweibon I*, 516 F.2d 594 (1975). Although all eight judges found the wiretaps to be illegal, the appeal spawned six separate opinions on the constitutional and statutory issues.[11] We remanded for consideration of affirmative defenses not yet reached by the district court.

On remand appellants filed a demand for a jury trial on the remaining issues. The district court struck the demand (*see* III App. 193), apparently on the ground that it was untimely. *See* Defendants' Motion to Strike Plaintiffs' Demand for Jury Trial (III App. 192). Upon appellants' subsequent petition for mandamus, we concluded that appellants had not waived their right to demand a jury trial on the affirmative defense of good

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[11] A plurality of the court joined Judge Wright's opinion, which found violations of both the Fourth Amendment and Title III. *Zweibon I,* 516 F.2d at 604-73 (plurality opinion). Judges McGowan and Robb filed concurring opinions; they found it unnecessary to reach the constitutional questions because they deemed the taps to be violative of Title III. *Id.* at 681-87 (McGowan, J., concurring in the judgment); *id.* at 688-89 (Robb, J., concurring). Judges MacKinnon and Wilkey filed opinions concurring in part and dissenting in part; both concluded that the JDL surveillance violated appellants' rights under the Fourth Amendment, but rejected the other judges' finding that Title III had also been contravened. *Id.* at 689-706 (Wilkey, J., concurring and dissenting); *id.* at 706-07 (MacKinnon, J., concurring in part and dissenting in part). Finally, while concurring in the plurality's disposition of the statutory and constitutional questions, Judge Bazelon wrote separately to disapprove the court's decision to permit Mitchell to raise certain affirmative defenses on remand. *Id.* at 675-81 (Bazelon, J., concurring in part, dissenting in part).

faith immunity. *In re Zweibon* (*Zweibon II*), 565 F.2d 742 (D.C. Cir. 1977) (per curiam).

While the mandamus petition was pending, Mitchell revived his motion for summary judgment. *See* Defendants' Renewed Motion for Summary Judgment (III App. 348). He argued that the decisions in *Keith* and *Zweibon I* should not be given retroactive application to either the statutory or the constitutional claims. The district court agreed and granted his renewed motion for summary judgment. *Zweibon v. Mitchell*, 444 F. Supp. 1296, 1298-1300 (D.D.C. 1978).

We again reversed. *Zweibon v. Mitchell* (*Zweibon III*), 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981). While agreeing with the district court that our application in *Zweibon I* of Title III to unconstitutional national security surveillance "represented a sharp break in the law which should be restricted to prospective effect," *id.* at 1182, we found that equitable considerations weighed in favor of applying *Keith* and *Zweibon I* retroactively to the constitutional claims. *Id.* at 1177-81. Despite the existence of contradictory lower court rulings, we rejected Mitchell's claim that the outcome in *Keith* and *Zweibon I* was not clearly foreshadowed. *Id.* at 1179. However, we observed that while

> [c]ontradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, . . . *such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.*

Id. at 1181 n.49 (emphasis added). We explictly noted that any concerns we might entertain for the fairness of retroactivity in this case were allayed by the potential availability of the good faith immunity defense. *See id.* at 1180-82 & nn.49-50. Accordingly, we again remanded for consideration of Mitchell's good faith defense.

On the third remand, the district court held a status conference. At that time, counsel for Mitchell was permitted, with the qualified consent of appellants, *see* note 13 *infra*, to proceed with discovery. Record of Status Call, *supra* note 1, at 13 (IV App. 78). Counsel advised that paper and deposition discovery would be sought, with a view to filing a new motion for summary judgment based on an expanded record following the disposition of *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982), which had just been argued before the Supreme Court.[12] *See* Record of Status Call, *supra* note 1, at 5-8, 12 (IV App. 70-73, 77). In particular, counsel declared his intention to depose all the appellants.[13] *Id.* at 10 (IV App. 75). Counsel for appellants objected to these proposed depositions as

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[12] In *Zweibon III*, this court incorporated the opinion issued the same day in Halperin v. Kissinger, 606 F.2d 1192, 1208-10 (D.C. Cir. 1979), as a basis for rejecting Mitchell's claim that he was entitled to absolute or qualified immunity as a matter of law. He was left to pursue on remand a qualified immunity defense grounded on subjective and objective criteria. *Zweibon III*, 606 F.2d at 1181. The Supreme Court was unable to resolve the immunity issues in *Halperin*, which was affirmed by an equally divided Court. 452 U.S. 713 (1981). Subsequently, writs of certiorari were granted in Nixon v. Fitzgerald, 452 U.S. 959 (1981), and Harlow v. Fitzgerald, 452 U.S. 959 (1981), which presented similar immunity issues.

[13] Counsel for Mitchell also announced an intention to depose nonparties in order to corroborate Mitchell's recollection of events surrounding his approvals of the JDL surveillance. Record of Status Call, *supra* note 1, at 8-9 (IV App. 73-74). It was to these depositions that appellants acceded, *id.* at 6 (IV App. 71), but no such depositions were ever noticed. Counsel for Mitchell also described his intention to depose all the appellants as "tentative," depending on the quality of responses he obtained from paper discovery. *Id.* at 10 (IV App. 75). Nonetheless, appellee noticed depositions of all appellants *before* he served them with interrogatories and requests for admissions. *See* Docket Entries at 6-8 (IV App. 11-12). Depositions were noticed for every working day between February 17 and March 17, 1982, a schedule even appellee characterizes as "intensive." Brief for Appellee at 13.

burdensome and unnecessary, but the court refused to circumscribe appellee's discovery at that time. *Id.* at 12-13 (IV App. 77-78).

During December 1981, deposition notices, interrogatories, and requests for admissions were served on all appellants. Docket Entries at 6-8 (IV App. 11-13). Appellants responded to the paper discovery but moved for a protective order quashing the notices of deposition. Motion for Protective Order (IV App. 54). Appellants contended that the proposed schedule was too intensive and the information sought by appellee was irrelevant to the remaining issues in the case. *See* Memorandum in Support of Plaintiffs' Motion for Protective Order (IV App. 55-65). Mitchell responded by arguing, *inter alia*, that depositions aimed at revealing the "true nature" of appellants' conduct with respect to Soviet installations might be relevant to the objective reasonableness of his decision to authorize the surveillance. *See* Defendant's Opposition to Plaintiffs' Motion for a Protective Order at 5-6 (IV App. 113-14). Mitchell also contended that depositions might elicit evidence relevant to the calculation of damages, as to which he believed appellants' own conduct might be presented to the jury in mitigation of damages or to preclude punitive damages. *Id.* at 6 (IV App. 114).

The district court denied appellants' motion for a protective order. Order of April 23, 1982 (IV App. 123). Appellants promptly filed a motion for reconsideration, in which they offered to *stipulate* that Mitchell could reasonably have believed reports he had received on JDL activities. Plaintiffs' Motion for Reconsideration of Order Denying Motion for Protective Order at 2, 3-4 (IV App. 125, 126-27). Appellants also "respectfully advise[d] the Court that they [would] not comply with defendant's request for these irrelevant depositions." *Id.* at 3 (IV App. 126).

Subsequently, at a hearing on the motion for reconsideration, counsel for appellants offered to make *one* ap-

pellant available so that the court could better assess the relevance of such testimony. Transcript of Hearing of April 5, 1982, at 3-5, 16 (IV App. 154-56, 167). Counsel also offered not to seek "special" damages, but declined to limit appellants' claim to one for nominal damages. *Id.* at 4-9 (IV App. 154-60). Appellants reiterated their intention to refuse to comply with notices of deposition. *Id.* at 5 (IV App. 156). The district court announced from the bench its decision to dismiss the complaint as a sanction pursuant to Fed. R. Civ. P. 37(b) for appellants' refusal to submit to depositions. *Id.* at 19 (IV App. 170). The final judgment and findings of fact and conclusions of law were entered on May 14, 1982. (IV App. 171-76). This appeal followed.

III. Issues on Appeal

As previously noted, we find it unnecessary to decide whether the district court should have granted appellants' request for a protective order and, if not, whether dismissal was an appropriate sanction for their refusal to comply with notices of deposition. We find Mitchell entitled to summary judgment as a matter of law on the issue of qualified immunity under principles recently enunciated in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982).

While the district court has not yet considered this defense, a reviewing court may rest its affirmance on any ground for which the record is sufficient to permit the necessary findings of fact and law. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Lew v. Suffridge*, 370 F.2d 487, 488 & n.1 (D.C. Cir. 1966). Appellants do not question the sufficiency of the record as a basis for resolving the defense; indeed, appellants insist that "discovery in this case had been completed before the district court entered summary judgment in 1978." [14] Brief for

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[14] Even if discovery had not been completed, the record would be sufficient to adjudicate Mitchell's qualified immunity

Appellants at 16. Moreover, the parties have briefed and argued the qualified immunity defense before this court.[15] Given the Supreme Court's admonition that insubstantial claims against government officials should not proceed to trial, *Harlow v. Fitzgerald, supra,* 102 S. Ct. at 2727 (citing *Butz v. Economou,* 438 U.S. 478, 507-08 (1978)), we would be remiss in our appellate duty were we to order yet another remand to resolve what is a purely legal threshold question. *See, e.g., Ellsberg v. Mitchell,*

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claim. In *Harlow,* the Supreme Court characterized the defense as a "threshold immunity question" before the resolution of which discovery should not be allowed. 102 S. Ct. at 2739.

[15] Appellants anticipated and addressed the immunity issues in their opening brief—*before* Mitchell had formally raised the issue in his brief on this appeal. Such anticipation was hardly prophetic, given the tenor of the Supreme Court's *Harlow* decision and defense counsel's previously stated intention to file a new motion for summary judgment once *Harlow* had been decided. *See* Record of Status Call, *supra* note 1, at 5-8, 12 (IV App. 70-73, 77).

Mitchell also argues that as Attorney General he is entitled to absolute immunity from actions for damages arising out of national security electronic surveillance. *See Harlow v. Fitzgerald, supra,* 102 S. Ct. at 2736 & n.18 (dictum). We find it unnecessary to reach this issue, since, as we hold below, Mitchell is clearly entitled to qualified immunity. We deem it prudent to defer the question until we are faced with a situation in which an Attorney General has trampled on unquestioned constitutional or statutory rights in the name of "national security." The careful balancing of competing values that inhere in immunity analysis—the public interest in encouraging the vigorous exercise of official authority and the importance of a damages remedy for the vindication of constitutional guarantees, *id.* at 2733; *Butz v. Economou, supra,* 438 U.S. at 504-06—should not be attempted until the accommodation of those values can be tested in a concrete factual setting. We decline, therefore, the invitation to reach out and resolve in dicta this important and difficult question. *See Ellsberg v. Mitchell, supra,* slip op. at 1 n.1 (MacKinnon, J., concurring in part and dissenting in part).

No. 82-1085, slip op. at 5-7 (D.C. Cir. May 10, 1983) (MacKinnon, J., concurring in part and dissenting in part); *Hall v. United States*, 704 F.2d 246, 249-51 (6th Cir. Mar. 25, 1983); *Silverman v. Ballantine*, 694 F.2d 1091, 1096 (7th Cir. 1982); *Wolfel v. Sanborn*, 691 F.2d 270, 272 (6th Cir. 1982) (per curiam) (Weick, J., dissenting), *cert. denied*, 103 S. Ct. 751 (1983).

A. *The* Harlow *Standard*

Before *Harlow*, qualified immunity was denied an official who

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [complainant] or if [the official] took the action with malicious intention to cause a deprivation of constitutional rights or other injury.

Wood v. Strickland, 420 U.S. 308, 320 (1975). The old test thus had objective and subjective elements: immunity was available only if the official had neither violated clearly established law nor acted out of malice. *See, e.g., Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Aware that denying absolute immunity to officials might subject them to harassing civil litigation, the Court admonished judges quickly to weed out frivolous claims through firm application of the Federal Rules of Civil Procedure. *Butz v. Economou, supra*, 438 U.S. at 507-08; *see Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part).

The Court discovered, however, that questions of subjective intent are rarely amenable to resolution on motions for summary judgment and that the broad-ranging discovery which resulted could often be disruptive of effective government. *Harlow v. Fitzgerald, supra*, 102 S. Ct. at 2737. Accordingly, the Court in *Harlow* made an "adjustment" of the standard for qualified immunity by severing the subjective element from the defense. *Id.*

at 2737-39. Concluding that "bare allegations of malice" should not be sufficient to subject officials to the burdens of trial and discovery, the Court held that government officials

> generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 2737 (citing *Procunier v. Navarette, supra,* 434 U.S. at 565; *Wood v. Strickland, supra,* 420 U.S. at 321). Thus, once the trial judge determines that the law was not clearly established at the time the contested conduct occurred, the inquiry ceases. *Id.* at 2738-39. At that point the official is entitled to summary judgment as a matter of law, and "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 2739.

B. *The Test Applied*

Our task after *Harlow*, therefore, is to measure Mitchell's conduct by reference to clearly established law at the time these wiretaps were authorized. The precise contours of what constitutes "clearly established law" for immunity purposes are difficult to delimit, and the Supreme Court has offered little guidance in this regard. *See id.* at 2738 n.32 ("As in *Procunier v. Navarette*, 434 U.S. 555, 565 (1978), we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the Local District Court.' "). We too are spared that Herculean labor, since we conclude that the illegality of Mitchell's conduct was not "clearly established" by any reasonable definition of the phrase.

As noted above, *see* pages 4-5 *supra,* the Supreme Court issued no pronouncement on the legality of warrantless

domestic national security surveillance until a year *after* the JDL wiretaps had been terminated. Even then, in declaring such searches illegal, the Court declined to articulate a crisp distinction between "foreign" and "domestic" threats to national security. *See Keith, supra,* 407 U.S. at 309 n.8. It is not surprising, therefore, that the district court should have reached one conclusion as to the legality of the JDL taps and that this court should have expended six separate opinions and over one hundred pages of analysis to reverse that conclusion. As appellee points out, a reading of *Zweibon I* alone "bel[ies] any suggestion that the Court was confronted with a simple issue automatically controlled by earlier decisions." Brief for Appellee at 61. Indeed, we observed in *Zweibon I* that this case "involve[s] the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for further disposition." 516 F.2d at 652; *see Keith, supra,* 407 U.S. at 309 n.8, 321-22.

Moreover, we recently had occasion in *Sinclair v. Kleindienst,* 645 F.2d 1080 (D.C. Cir. 1981), to consider whether factually similar warrantless surveillances violated clearly established law. *Sinclair* involved alleged constitutional violations stemming, in part, from the very surveillance which culminated in the *Keith* decision. The FBI had maintained wiretaps on the Black Panther and White Panther parties between February 1969 and January 1971. *Id.* at 1081. As in the present case, the government unsuccessfully asserted that warrants were unnecessary because the taps were aimed at collecting information necessary to protect the nation's internal security. After the *Keith* Court spurned that assertion, plaintiffs brought an action for damages against Mitchell and other officials. The district court granted summary judgment in favor of Mitchell on the issue of qualified immunity. *Id.* at 1082-83.

We affirmed the decision regarding immunity. *Id.* at 1084-85. Observing that the Supreme Court had expressly

reserved ruling on the legality of warrantless national security surveillances in *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967), we noted that the only federal courts that had addressed the issue at the time the wiretaps were in place had concluded that warrants were unnecessary. *Sinclair v. Kleindienst, supra*, 645 F.2d at 1084 (citing *United States v. Stone*, 305 F. Supp. 75 (D.D.C. 1969); *United States v. O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969)). As a result, we held that for purposes of qualified immunity Mitchell had entertained a reasonable belief in the legality of his conduct. *Sinclair v. Kleindienst, supra*, 645 F.2d at 1084-85 (citing *Chagnon v. Bell*, 642 F.2d 1248, 1258 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981)).

Our decision in *Sinclair* controls the disposition of this appeal. If there was no clearly established warrant requirement as of January 1971 (the date of the last surveillance in *Sinclair*), it follows that there was no such requirement as of March 31, 1971 (the date Mitchell authorized the last series of JDL surveillances), or even as late as July 3, 1971 (the date the surveillance was finally terminated). *See* note 9 *supra*.

We also acknowledged in *Sinclair* that there "was no judicially imposed reasonableness requirement for national security wiretaps at the time," *id.* at 1082, and that the minimization procedures Mitchell himself had prescribed, *see* note 8 *supra*, "predated any judicial requirement for them in national security surveillance." 645 F.2d at 1085. Similarly, in *Chagnon v. Bell, supra*, we noted that even in its 1972 *Keith* opinion the Supreme Court had "declined to delineate 'precise standards for domestic security warrants'" and instead had invited Congress to articulate them. 642 F.2d at 1262 (quoting *Keith, supra*, 407 U.S. at 323). It is plain, therefore, that there existed no clearly established warrant or reasonableness requirements at the time Mitchell authorized the JDL surveillance.

Undaunted, appellants proffer three "critical" bases for distinguishing *Sinclair*—a decision they do not even deign to cite in their opening brief. None of the bases is "critical."

First, appellants maintain that, even if it had been reasonable to conclude in 1970 that no warrant was required to eavesdrop on the Black Panther Party—which threatened violent overthrow of the government and maintained some contact with foreign governments—it was not similarly reasonable to conclude that it was lawful to conduct warrantless surveillance of the JDL—a domestic group "which posed no threat to our own government and did not act in concert with a foreign power." Appellants' Reply Brief at 13. That such a slender distinction is not "critical" seems self-evident, especially in light of the complex arguments and sharp differences of opinion that characterized our various analyses of the Fourth Amendment claims in *Zweibon I*. *See* note 11 *supra*. Even in *Keith*, the Supreme Court declined to elaborate on the incidents of "foreign" versus "domestic" surveillances. 407 U.S. at 309 n.8. Consequently, we refused to follow precisely this route in *Zweibon I*:

> *Although appellants contend and appellees admit that the JDL is a domestic organization with no Russian connection, that fact does not mean that appellants are correct in their assertion that the warrantless surveillance here is automatically unlawful.* In *Keith*, "[t]here was no evidence of any involvement, directly or indirectly, of a foreign power." Here, by contrast, while there is no collaboration between the JDL and Russia—quite the reverse —JDL's activities did involve Russia in a confrontation with the United States. Thus this case does indeed involve the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for future disposition. Although the type of involvement here was not anticipated in *Keith*, there is no indication that *Keith* intended to limit "involvement" to collaboration with

> a foreign power. Collaboration simply was the most obvious example of how a domestic organization could become involved in the foreign affairs of this country.[189]
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> [189] *See* 407 U.S. at 309 n.8, 80 S.Ct. 2125. For example, if the defendant in *Keith* had been financed by a foreign power, the Court would have treated the case as involving the foreign aspects of our national security even though the foreign power had itself taken no overt action against this country. *In our case, since the threat to national security emanated from Russia, there is no question that the President's foreign affairs powers must be considered in our decision whether the surveillance was lawful.*

516 F.2d at 652 & n.189 (footnotes omitted) (emphasis added). A public official should not be made to guess, at his peril, whether distinctions as rarefied as those appellants proffer might one day subject him to personal liability for his official acts. Such a crabbed immunity defense "would dampen the ardor of all but the most resolute." *Gregorie v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950) (L. Hand, J.).

Second, appellants contend that contemporaneous internal Department of Justice memoranda written for Mitchell demonstrate that such distinctions were "understood by advisors to this defendant." Appellants' Reply Brief at 13; *see* note 4 *supra.* The short answer to this argument is that it is irrelevant after *Harlow.* It goes only to Mitchell's subjective good faith, an element now shorn from the defense of qualified immunity. *See Harlow v. Fitzgerald, supra,* 102 S.Ct. at 2738 (limits of qualified immunity defined "essentially in objective terms"). Furthermore, because "discovery should not be allowed" until the "threshold immunity question is resolved," *id.*, we are reticent to allow appellants to benefit from the fruits of discovery that took place before *Harlow* was decided.[16] Finally, our reading of the internal

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[16] We would not have our opinion read to excuse the extraordinarily sly violator "who *actually knows* that he was violat-

memoranda discloses that they make predictions as to future action by the Supreme Court and discuss strategic considerations for potential litigation; the memoranda do not purport to declare what was then legally permissible conduct with respect to warrantless national security surveillance.

Third, appellants would distinguish *Sinclair* on the ground that, by the time Mitchell renewed his second wiretap authorization in this case, two lower courts had found warrantless wiretaps to be improper when directed at domestic groups. Appellant's Reply Brief at 13; *see* Brief for Appellant at 36; *accord Forsyth v. Kleindienst,* 551 F. Supp. 1247, 1255 (E.D. Pa. 1982), *proceedings stayed pending appeal,* 700 F.2d 104 (3d Cir. 1983). It is true that two district courts had so ruled less than three months before Mitchell's March 3, 1971 authorization. *See United States v. Sinclair,* 321 F. Supp. 1074 (E.D. Mich. Jan. 26, 1971); *United States v. Smith,* 321 F. Supp. 424 (C.D. Cal. Jan. 8, 1971). We allow to pass unremarked the exiguous amount of time—roughly two-and-a-half months—appellants apparently would vouchsafe the Attorney General in which to evaluate, assimilate, and apply in a systematic fashion isolated lower court decisions that might bear on the Department's day-

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ing the law . . . , even if he could not 'reasonably have been expected' to know what he actually did know." *Harlow v. Fitzgerald, supra,* 102 S. Ct. at 2740 (Brennan, J., concurring) (emphasis in original). The Court's *Harlow* opinion appears to have been carefully crafted to avoid such an egregious, if doubtless rare, result. *See id.* at 2737 ("*bare allegations* should not suffice") (emphasis added); *id.* ("We therefore hold that government officials . . . *generally* are shielded from liability . . . insofar as their conduct does not violate clearly established statutory or constitutional rights . . . .") (emphasis added). We merely conclude that, whatever the wisdom of disregarding the advice of some of his advisors, Mitchell did not "actually know" that his conduct was illegal and that the memoranda cannot otherwise support an inference that his belief was *objectively* unreasonable.

to-day operations.[17] Even if timing were not a factor, we are loath to suggest that the Attorney General of the United States is bound by lone decisions by two local district judges. He occupies a national office, and hence his perspective must be national in scope—especially where national security considerations are implicated.

Moreover, these two decisions were not the only lower court decisions dealing with the putative national security exemption from the warrant requirement; they were merely the first cases to exclude surveillance of domestic organizations from the scope of that exemption. Mitchell could reasonably have relied on *other* lower court decisions in which warrantless national security surveillances were held permissible. *See, e.g., United States v. Butenko,* 318 F. Supp. 66 (D.N.J. 1970), *aff'd,* 494 F.2d 593 (3d Cir.), *cert. denied,* 419 U.S. 881 (1974); *United States v. Brown,* 317 F. Supp. 531 (E.D. La. 1970), *appeal dismissed,* 456 F.2d 1112 (5th Cir. 1972) (per curiam), *aff'd,* 484 F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974); *United States v. Dellinger,* No. 69 Cr. 180 (N.D. Ill. 1970) (III App. 356); *United States v. O'Neal,* Cr. No. KC Cr. 1204 (D. Kan. 1970); *United States v. Clay,* Cr. No. 6711-94 (S.D. Tex. 1969), *aff'd,* 430 F.2d 165 (5th Cir.), *rev'd on other grounds,* 403 U.S. 698 (1971).

Appellants rejoin that Mitchell should have distinguished all these cases. Thus, they suggest that *Dellinger* and *O'Neal* might have been distinguished on the ground that the criminal defendants in those cases were allegedly seeking the overthrow of the government. Brief for Appellant at 35-36. But neither the disclaiming foot-

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[17] We find it odd that appellants would charge Mitchell with a duty to apply, at his peril, a couple of lower court decisions to an ongoing surveillance while appellants themselves seek to impugn his reliance on United States v. O'Neal, Cr. No. KC Cr. 1204 (D. Kan. 1970), and United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970), on the ground that they "were decided after the initial wiretap authorizations." Brief for Appellants at 35.

note in *Katz*, nor Justice White's celebrated concurring opinion therein, purported to confine the open question to surveillances aimed only at efforts to overthrow the government. *See* 389 U.S. at 358 n.23; *id.* at 363-64 (White, J., concurring). Nor did *Katz* suggest that a "national security" exemption might excuse warrantless surveillance directed at foreign embassies (*Clay, Brown*) or at individuals allegedly engaged in foreign espionage (*Butenko*), but not surveillance aimed, as in the present case, at meeting threats to our foreign relations or to American diplomatic personnel abroad. We reiterate that even in *Keith* the Supreme Court did not draw the nice distinctions upon which appellants argue the personal liability of an Attorney General should turn.

Perhaps anticipating that efforts to distinguish *Sinclair v. Kleindienst* would be unpersuasive, appellants assail, without citing, the holding of *Sinclair* itself. To this end, appellants maintain that the "clearly established" test for immunity purposes is coterminous with the "clearly foreshadowed" test courts employ to determine whether a judicial decision ought to be given retroactive effect. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Accordingly, appellants conclude that our decision in *Zweibon III* giving retroactive effect to *Keith* and *Zweibon I* disposes of the immunity defense now that *Harlow* bars inquiry into subjective intent. Brief for Appellants at 24-27. In addition, by gathering scattered dicta from *Katz*, *Alderman v. United States*, 394 U.S. 165 (1969), and *Giordano v. United States*, 394 U.S. 310 (1969), appellants "poll" the Supreme Court Justices on the scope of the national security exemption as of 1970. Appellants come up with six Justices (including Justice Fortas) who had indicated their agreement with the proposition *Keith* eventually would establish. As a result, appellants conclude, the unlawfulness of the JDL surveillance was "clearly established" by prior decisions. *See* Brief for Appellants at 32-34.

Even ignoring the inherent difficulties and imprecision that must attend any "vote" based on statements made in other decisional contexts, appellants' "poll" proves nothing, since it applies a different test from that expounded in *Harlow.* The test for qualified immunity is "clearly established," not "clearly foreshadowed." The distinction is self-evident.

Appellants' attempt to pass off the two standards as coterminous receives no support from *Harlow* itself. Nowhere does the Court employ the phrase "clearly foreshadowed"; nor does the Court suggest that its standard bears any relationship to that for retroactivity. To the contrary, immediately after stating its new holding that officials are immune insofar as their conduct does not violate clearly established law, the Court makes clear that the *content* of the standard is identical to that for establishing the "objective" element of the old two-pronged test for qualified immunity. *See* 102 S. Ct. at 2737 (citing *Procunier v. Navarette, supra,* 434 U.S. at 565; *Wood v. Strickland, supra,* 420 U.S. at 321). Appellants concede that the *Harlow* test "remained . . . the same as had been defined in *Wood v. Strickland.*" Brief for Appellants at 25. The concession is telling, for the very pages in *Wood* to which appellants and the *Harlow* Court—direct us describe the objective standard as follows:

> [A]n act violating . . . constitutional rights can be no more justified by ignorance or disregard of *settled, indisputable law* . . . than by the presence of actual malice.
>
> [A school board member] must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the *basic, unquestioned constitutional rights* of his charges.

Wood v. Strickland, supra, 420 U.S. at 321, 322 (emphasis added). It is evident that language which speaks

of "indisputable law" and "unquestioned rights" cannot be reconciled with the "clearly foreshadowed" test.

Moreover, our decision in *Zweibon III* evinces a clear understanding of the differences between the tests for retroactivity and immunity. In fact, we invoked those differences to allay any lingering concerns over the fairness of retroactivity:

> Our rejection of the claim that *Keith* and *Zweibon I* should only be applied prospectively because they were not clearly foreshadowed . . . should not be seen to undercut a claim of reasonable grounds for believing the legality of one's actions on the immunity issues. Contradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, but such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.

Zweibon III, 606 F.2d at 1181 n.49. *See also id.* at 1181 n.50 ("[W]e believe that because qualified immunity protects potential defendants acting in good faith and in accordance with a reasonable understanding of applicable law, equitable considerations favor retroactivity to provide compensation for constitutional injury."). The two tests, therefore, are not coterminous.

We are not unmindful of the consequences that might attend a too niggardly definition of what constitutes "clearly established" law. Attorneys General are lawyers, after all—often good ones—and every first-year law student learns how to distinguish cases which on first blush seem squarely on point. But the distinctions between Mitchell's conduct here and that condemned in *Katz* or even *Keith* are real and substantial. Mitchell could reasonably have relied on those distinctions in authorizing the JDL wiretaps. Nothing in our opinion today should be read to suggest that impermissible conduct may be excused by the drawing of trivial factual distinctions.

IV. CONCLUSION

Having carefully considered the record and all of appellants' arguments,[18] we find that Mitchell is entitled to summary judgment as a matter of law on the question of qualified immunity. Therefore, the decision of the district court is affirmed.[19]

Judgment accordingly.

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[18] Two other issues raised by appellants may be disposed of in cursory fashion. First, appellants contend that if the JDL wiretaps constitute "a 'good faith' surveillance undertaken primarily for *prosecutorial* purposes, then [appellee] violated 'clearly established' law." Brief for Appellants at 56 (emphasis in original). We dismissed this argument in *Chagnon v. Bell,* concluding that there exist no clear standards for defining or evaluating the "purpose" of a warrantless national security wiretap. Consequently, allegations of prosecutorial purpose raise no genuine issues relevant to the defense of qualified immunity. 642 F.2d at 1062 n.25.

Second, appellants argue that, even if Mitchell violated no clearly established rights under the Fourth Amendment, appellants' clearly established *Sixth* Amendment rights were violated when the taps remained in place after a number of appellants had been indicted on criminal charges. *See* page 3 & notes 8-9 *supra.* Unfortunately, appellants can advert to no evidence whatsoever that might indicate that Mitchell was aware that the surveillance had not been terminated upon indictment in accordance with the instructions he had previously issued. *Zweibon I,* 516 F.2d at 610-11 ("Mr. Mitchell was unaware that the taps continued for more than a month after criminal indictments were handed down against several individuals (five of whom are plaintiffs in this case) whose conversations, including those with their attorney, were overheard in violation of Justice Department regulations.") (footnotes omitted) ; *see* page 3 & note 10 *supra.*

[19] The dissent contends that the decision in Katz v. United States, 389 U.S. 347 (1967), "clearly established" that presidentially authorized wiretaps were illegal, and that the Court's explicit reservation regarding "situation[s] involving the national security," *id.* at 358 n.23, was merely a hint that the Court might choose to "create" an exception "in the future." *See infra* at 3. This reading of *Katz* must be rejected. Wire-

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taps, in national security situations, were authorized by presidents as early as 1915. The practice became well-established during the administration of President Franklin D. Roosevelt, and was continued by each succeeding administration. See the history of presidentially authorized wiretapping set forth in United States v. Barker, 514 F.2d 208, 243 nn.14 & 16, 246-48 (MacKinnon, J., dissenting). The Supreme Court recently stated that while a practice "in violation of the Constitution" does not become constitutional "by long use," nevertheless "an unbroken practice . . . is not something to be lightly cast aside." Marsh v. Chambers, No. 82-23, slip op. at 7 (U.S. July 5, 1983) (*quoting* Walz v. Tax Commission, 397 U.S. 664, 678 (1970)). A governmental practice established by specific written presidential orders effective continuously for over 40 years must be recognized as being clearly established. And *Katz* also specifically recognized that the constitutional restriction on searches conducted outside the judicial process was "subject . . . to a few . . . exceptions." 389 U.S. at 357. In view of this long-standing and continuous practice, the Court's explicit reservation in *Katz* makes it clear that the Court was referring to existing "exceptions," not, as the dissent asserts, simply speculating about whether it would "create" an exception at some future date.

The dissent also asserts that it is Mitchell's burden to prove that the law was *established* in his favor at the time he acted. This is not consistent with *Harlow*. It was only necessary for the Attorney General to show that the law was unsettled (as the conflicting district court cases and this court's struggles with the issue in *Zweibon I* amply demonstrate), *not*, as the dissent suggests, that a Supreme Court opinion had specifically approved the Attorney General's actions.

SWYGERT, *Senior Circuit Judge*, dissenting: I would reverse the district court's dismissal and direct entry of judgment for the plaintiffs. The issue is whether John N. Mitchell, under whose direction the FBI installed warrantless electronic wiretaps in the Jewish Defense League headquarters between October 1970 and July 3, 1971, is entitled to immunity from liability for his violation of plaintiffs' right to be free from unreasonable searches and seizures. There is no question that Mitchell violated those rights. *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (*en banc*) (*Zweibon I*), *cert. denied*, 425 U.S. 944 (1976). The only question is whether the constitutional prohibition of warrantless eavesdropping in these circumstances was "clearly established" at the time the wiretaps were ordered, under the standard established by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Court there held

> that Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

Mitchell has not met his burden of establishing an immunity defense under the *Harlow* standard. At the time Mitchell ordered the warrantless wiretaps at issue, *United States v. Katz*, 389 U.S. 347 (1967), had established

> that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few exceptions.

Id. at 357 (footnotes omitted).

Because the Supreme Court had expressly reserved ruling on national security wiretaps in *Katz*, the majority

concludes that no clearly established warrant or reasonableness requirements existed at the time Mitchell authorized the surveillance. Although *Katz* did not expressly decide whether the requirements of the fourth amendment could be satisfied in a situation involving the national security if "safeguards" short of a magistrate's authorization were provided, *id.* at 358 n.23; *see also id.* at 364 (White, J., concurring), the majority's reliance on these reservations ignores the Court's broad holding that long-established fourth amendment protections apply to electronic surveillance, as to other forms of intrusions, subject only to well-defined exceptions such as searches incident to arrest, searches made in hot pursuit, and searches subject to consent. *Katz* established no exception to this general rule of fourth amendment applicability for situations involving national security; indeed, the Court emphasized that "[i]t is difficult to imagine how any of those [established] exceptions could apply to the sort of search and seizure involved in this case." *Id.* at 357. The Court's footnote and Justice White's comment did not create a national security exception, but rather declined to state whether such an exception might be created in the future. It was the exception, rather than the rule, that was not clearly established in 1970-1971. The majority's analysis anomalously transforms the lack of an exception into the lack of a rule.

Subsequent cases demonstrate the presumptive breadth of the *Katz* rule. In *United States v. United States District Court*, 407 U.S. 297, 314-21 (1972) (*Keith*), the Supreme Court, relying on the general language of *Katz*, held that judicial approval was required prior to electronic surveillance in domestic national security cases. Similarly, in *Zweibon I*, *supra*, a plurality of this court noted that *Katz* stated a broad and general rule "that warrantless electronic surveillance conducted through non-trespassory methods is an unreasonable search and

seizure within the meaning of the Fourth Amendment." 516 F.2d at 611. Finally, in *Zweibon v. Mitchell*, 606 F.2d 1172, 1179 (D.C. Cir. 1979) (*Zweibon III*), this court held "that *Keith* and *Zweibon I* . . . did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations."

The majority's reasoning that the lack of a specific ruling that warrantless electronic surveillance was constitutionally proscribed in national security situations left Mitchell no clearly established guidelines is skewed. In my view, the unquestioned constitutional right that was violated in this case is the right, *reaffirmed* by *Katz* in 1967, to be free from unreasonable searches and seizures. *Katz* did not *extend* fourth amendment protections, but rather concluded that no exception exempted electronic eavesdropping from the coverage of those protections. In the same sense, *Keith* did not *extend* fourth amendment protection to domestic organizations. *See Keith*, 407 U.S. at 320 ("We do not think a case has been made for the requested *departure* from Fourth Amendment standards."). Because the fourth amendment warrant requirement is presumed to apply unless a clear exception excuses compliance, and because no exception for national security cases was established when Mitchell acted, the law to which he was subject was "clearly established." Under the majority's reverse reasoning, "clearly established statutory or constitutional rights" would be fact-bound, circumscribed by the particular circumstances of prior litigated cases, rather than by the principles by which those cases were decided.

Mitchell chose to ignore the principle on which *Katz* turned, apparently gambling that later Supreme Court decisions might limit the universality of *Katz* by establishing exceptions in national security situations. Under the *Harlow* standard, however, government officials who depart from "settled, indisputable law" in the hope that

an exception will later be created justifying their conduct do so at their peril.*

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* The majority finds it "odd that appellants would charge Mitchell with a duty to apply, *at his peril," see ante* at 19, n.17 (emphasis added), two district court decisions finding warrantless wiretaps unconstitutional when directed at domestic groups. "Application" of *United States v. Smith,* 321 F. Supp. 424 (C.D. Cal. 1971), or *United States v. Sinclair,* 321 F. Supp. 1074 (E.D. Mich. 1971), would have resulted in either the cessation of the warrantless wiretaps or the procurement of a warrant. It is unclear to me what "peril" Mitchell would have faced had he chosen either of these options.

Further, it is difficult to reconcile the majority's emphasis on the "reasonableness" of Mitchell's reliance on certain district court opinions with the "irrelevance" of Mitchell's disregard of internal Justice Department memoranda advising him that warrants were required. If the latter are irrelevant under *Harlow,* I would assume the former would be also.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1444

REMOLA BOYKIN, *et al.*, APPELLANTS

v.

THE DISTRICT OF COLUMBIA

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 80-1493)

Argued January 12, 1982

Decided September 10, 1982

R. Kenneth Mundy, with whom *Samuel J. Lowe* was on the brief, for appellants.

David P. Sutton, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before TAMM, *Circuit Judge*, ROBB, *Senior Circuit Judge*, and HOWARD T. MARKEY,* *Chief Judge*, United States Court of Customs and Patent Appeals.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: In late July of 1979, Jefferson Boykin, Jr., was shot and killed by an officer of the District of Columbia's Metropolitan Police Department (MPD) following a chase that commenced when Boykin was questioned regarding his alleged involvement in an armed robbery. In the case at bar, appellants Remola and Jeff Boykin, the parents of Jefferson Boykin, have brought a multifaceted action alleging that the shooting of their son was tortious and in violation of his civil and constitutional rights. The only defendant named by the appellants in the district court, and the appellee here, is the District of Columbia. The district judge, after reviewing the pleadings and other pretrial memoranda submitted by the parties, concluded that appellants raised no cognizable federal claims in their action but rather sought recovery solely on the basis of common law torts; accordingly, the judge dismissed *sua sponte* the litigation without prejudice on jurisdictional grounds. We agree that appellants' suit was properly dismissed by the district judge, although we express no view on the validity of his jurisdictional analysis. Rather, recent decisions of this and other appellate courts have made it clear that municipalities such as appellee are not subject to *respondeat superior* liability in so-called *Bivens* actions. Thus, since appellants' only federal claims on appeal involve precisely such vicarious liability, it is clear that their complaint failed to state any federal claim for which relief could be granted and was properly dismissed in the district court.

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

I. THE PROCEEDINGS BELOW

A. *The Complaint*

On June 17, 1980, appellants filed this action for 4.5 million dollars in compensatory and punitive damages against the District of Columbia, alleging that a police officer employed by the District had wrongfully shot and killed their son the preceding year. The two police officers involved in Jefferson Boykin's apprehension and shooting were not made parties to the suit. Appellants' complaint presented six claims for relief, five of which were pendent "state" common law claims.[1] The only federal claims asserted by appellants were found in their first count, which alleged that appellee had deprived their son of rights secured by 42 U.S.C. §§ 1983, 1985, and 1986 (1976 and Supp. IV 1980), and by the Fourth and Fifth Amendments to the United States Constitution.[2] Jurisdiction was asserted under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) and under 28 U.S.C. § 1343 (1976) (civil rights actions jurisdiction).

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[1] The five pendent common law claims asserted by appellants were (1) fraud by the District of Columbia in misrepresenting the circumstances surrounding decedent's death, (2) assault and battery, (3) wrongful death, (4) intentional infliction of emotional distress, and (5) a survivor's action on behalf of decedent's estate. Complaint at 3-5, Boykin v. District of Columbia, No. 80-1493 (D.D.C. Apr. 10, 1981); Appellants' Appendices (A.A.) at 3-5.

[2] The federal claims proffered by appellants included allegations that the "illegal acts of [appellee's] agents" denied the decedent his "rights to life, liberty and freedom from government assault, arrest, prosecutio [sic] and persecution." Complaint at 3, Boykin v. District of Columbia, No. 80-1493 (D. D.C. Apr. 10, 1981); A.A. at 3. The right to recover damages against municipal employees under § 1983 has, of course, been recognized since the seminal case of Monroe v. Pape, 365 U.S. 167 (1961). In 1979, Congress amended § 1983 to cover acts committed under the color of District of Columbia law. *See infra* note 3. As for the claims based directly on the federal Constitution, the Supreme Court recognized an implied

B. *The Incident at Issue*

The parties' respective characterizations of the events that transpired during the late hours of July 24 and the early morning hours of July 25, 1979, could hardly be more divergent. Appellants contend that on the evening of July 24, two MPD officers were patrolling the area near the intersection of Vermont Avenue and Fourteenth Street, N.W., looking for suspects in connection with a street robbery that had been reported in that area earlier in the evening. At some point during the evening, appellants allege, the two officers approached Jefferson Boykin and several unidentified youths who were standing near the corner of Fourteenth Street and Rhode Island Avenue, N.W. When questioned about the robbery, the youths ran in different directions; Boykin ran into a parking lot located at 1313 Fourteenth Street, N.W. The MPD officers pursued Boykin, appellants submit, and found him hiding under a parked vehicle in the lot. Thereafter, appellants contend, Boykin ran again and was subsequently caught from behind by one of the officers.

Appellants allege that the second MPD officer deliberately fired his weapon at Boykin from only a few feet away *after* the first officer apprehended him. Indeed, appellants contend that Boykin was in fact falling forward toward the shooting officer at the time of the shot as a result of the first officer's handling. Appellants deny that Boykin possessed any weapon at the time he was shot and contend that the officer who fired the shot had approached the scene with his pistol drawn.

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cause of action for damages for the violation of Fourth Amendment rights in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). There has yet been no comparable holding by the Court with regard to rights protected by the Fifth Amendment.

In response, appellee in its pretrial statement proffered the following statement of facts. While driving along Fourteenth Street, N.W., on the evening in question, two MPD officers were flagged down by two individuals who reported that they had just been robbed at gunpoint. As the officers and victims cruised the area, appellee contends, the perpetrators of the crime were spotted, and the two officers left their vehicle and chased the suspects on foot. A short time later, after failing to apprehend any of the suspects, the officers reentered their car and renewed their search, spotting Boykin—one of the individuals originally identified—hiding in the parking lot at 1313 Fourteenth Street, N.W.

After a brief chase on foot, appellee contends, one of the officers caught Boykin and began to spin him around; as this action occurred, the second officer allegedly observed that Boykin had pulled a pistol from his waist and was poised to shoot the officer who had placed him in custody. Upon seeing the gun, the second officer allegedly shouted to draw his partner's attention to the threat and then drew his revolver and shot Boykin once in the chest. The combined force of the spinning movement and the impact of the bullet, appellee submits, propelled the weapon Boykin was allegedly carrying some forty feet from the locus of the shooting.

The most significant divergence between the parties' versions of the facts is, of course, appellee's contention that the decedent was carrying and had drawn a weapon at the time he was shot. As we must on review of a trial court ruling dismissing a complaint, however, we shall accept the allegations made by appellants as true. *See Harper v. McDonald*, 679 F.2d 955, 960 (D.C. Cir. 1982) (per curiam).

C. *The District Court's Ruling*

As noted above, five of the six counts of appellants' complaint in the district court were common law claims against a non-diverse party over which a federal court would have subject matter jurisdiction only through the exercise of pendent jurisdiction. Accordingly, the critical question for the district judge, and for us on review, is whether the first count of appellants' complaint presents a substantial ground for federal jurisdiction.

This crucial first claim of the Boykins proffers two broad grounds of liability under federal law—statutory liability under 42 U.S.C. §§ 1983, 1985, and 1986, and liability based directly on violations of the Fourth and Fifth Amendments to the federal Constitution. As for the statutory claims, the district judge rejected appellants' prayer for relief based on the three cited civil rights statutes. The trial court rejected appellants' section 1983 claim because that section did not apply to deprivations of federal rights committed under color of District of Columbia law at the time that the police conduct complained of allegedly occurred. *Boykin v. District of Columbia*, No. 80-1493, Order at 1 (D.D.C. Apr. 10, 1981).[3] As for the claims based on sections 1985 and 1986, the trial judge ruled that those provisions had no applicability to employees and appendages of the District of Columbia.[4] *See District of Columbia v. Carter*, 409 U.S. 418 (1973). Accordingly, the district judge dismissed the statutory claims pressed against appellee in appellants' first count.

Appellants' constitutional claims presented more difficult issues for resolution. It is now well established that a private cause of action exists against federal officials for the violation of Fourth Amendment rights. *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971). Appellants contended in the district court that a comparable private cause of action exists where a violation of the Fifth Amendment's due process clause is alleged. Relying on *Bell v. Hood,* 327 U.S. 678 (1946), the decision of our court in *Payne v. Government of the District of Columbia,* 559 F.2d 809 (D.C. Cir. 1977), and certain district court opinions,[5] appellants submitted that a *Bivens*-type action is cognizable where the alleged infringement of constitutional rights involves rights guaranteed by the Fifth Amendment.

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[3] Although, as the district judge noted, Congress amended § 1983 in 1979 to provide for suits against District of Columbia officials based on unlawful behavior committed under color of District law, that amendment had only prospective effect and thus applied only to incidents occurring after December 29, 1979. Pub. L. No. 96-170, § 3, 93 Stat. 1284, 1284 (codified at 42 U.S.C. § 1983 (Supp. IV 1980)). Boykin v. District of Columbia, No. 80-1493, Order at 1 (D.D.C. Apr. 10, 1981).

[4] Boykin v. District of Columbia, No. 80-1493, Order at 1 (D.D.C. Apr. 10, 1981).

The district court, however, did not reach the question whether the principle embraced by the *Bivens* Court extended to the rights protected by the Fifth Amendment. Rather, relying on *Bell v. Hood,* the court held that it lacked jurisdiction to hear appellants' constitutional claims because those claims were "immaterial to the issues actually presented by this lawsuit and were apparently filed solely to secure entry to federal court."[6] The district judge's scrutiny of the complaint and pretrial filings of appellants convinced him that they in fact sought recovery solely on the basis of common law torts. Because both the statutory and constitutional bases for appellee's liability were thus inadequate, the district judge concluded that appellants failed to present a substantial federal question of the type that would ground jurisdiction under 28 U.S.C. § 1331.

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[5] In addition to the *Bell* and *Payne* decisions, appellants rely on Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979), and Saffron v. Wilson, 70 F.R.D. 51 (D.D.C. 1975). In the *Thornwell* case the district judge ruled that a private cause of action under the Fifth Amendment should be implied in this circuit. 471 F. Supp. at 354. In *Saffron* the judge suggested that *Bivens* has been read to extend to the protection of all constitutionally recognized interests. 70 F.R.D. at 53 n.1.

[6] Boykin v. District of Columbia, No. 80-1493, Order at 2 (D.D.C. Apr. 10, 1981).

Having rejected the federal claims against the District of Columbia, the court dismissed as well all of the pendent common law claims under the doctrine of *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). The dismissal was, however, "without prejudice to refiling in the appropriate forum."[7] We would note that since the date of the dismissal appellants have refiled their action in the District of Columbia Superior Court.

D. *The Positions on Appeal*

As is the case with their respective characterizations of the facts, the parties' positions before this court could hardly be more divergent. Indeed, so different are their approaches that it scarcely seems as though they are involved in the same litigation.

Appellants proffer two major arguments on appeal. First, they contend that there is under federal common law—or at least should be—an implied private cause of action for damages against those federal officials who deprive an individual of the rights guaranteed by the Fifth Amendment's due process clause. The constitutional right appellants assert is, of course, the right to be free from the deprivation of one's life without due process of law. Invoking *Bell v. Hood* once again, appellants argue that once a constitutional injury is demonstrated, the aggrieved individual is entitled to an award of damages as "a particular remedial mechanism normally available in the federal courts." *Bell v. Hood*, 403 U.S. at 397; *see also Marbury v. Madison*, 5 U.S. 87, 102-03, 1 Cranch 137, 163 (1803). Appellants submit that appellee's employees deprived Jefferson Boykin of rights secured by the Fourth and Fifth Amendments, thus activating both this implied right of action and the comparable one recognized by the *Bivens* Court.

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[7] *Id.*

Appellants' second major argument challenges the district court's finding that the complaint presented no substantial ground for federal jurisdiction. Both the parties and the district judge agreed that the doctrines of *Bell v. Hood* governed the determination of whether an allegation of a so-called constitutional tort presented a federal question substantial enough to survive a motion to dismiss on jurisdictional grounds. As appellants note, the *Bell* Court cited approvingly the traditional rule for determining the existence of federal question jurisdiction: where the complaint is clearly drawn to claim a right to recover directly under the Constitution, jurisdiction exists, and a federal court must in most cases entertain the suit. 327 U.S. at 681-82. As the district court noted, however, the Court specified two situations in which an action alleging a constitutional deprivation or federal statutory claim may be dismissed for want of jurisdiction: "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-83.

In the case at bar, the district judge invoked the first of these exceptions in dismissing appellants' complaint, concluding that the gravamen of their action is a claim based on common law tort concepts and that the outcome of the litigation would turn exclusively on common law principles. Appellants, relying on our decision in *Payne*, argue in response that "*Bell* makes clear that the availability of a mechanism for local remediation does not ipso facto foreclose the possibility of a concurrent federal cause of action . . . ." *Payne*, 559 F.2d at 817 (opinion of Robinson, J.). Arguing that they should be the "master" of the law upon which they rely, appellants submit that their constitutional claims were neither so insubstantial nor devoid of merit as not to be of constitutional magnitude and thus argue that the district court's dismissal was erroneous.

In response, appellee District of Columbia bases its argument for affirmance not on the jurisdictional ground employed by the district court in disposing of the case but rather on the ground that appellants have failed to allege any federal claim for which relief could be granted. In proffering this argument appellee does not vigorously assert that appellants have presented a frivolous or insubstantial claim in the *Bell v. Hood* sense; the District contends, rather, that it cannot as a matter of law be subjected to *respondeat superior* liability on the basis of constitutional torts committed by its employees. Relying heavily on *Monell v. Department of Social Services*, 436 U.S. 658 (1978),[8] the District submits that, although it may be held legally responsible for constitutional torts resulting from an official policy, it cannot be held liable for constitutional torts committed by its employees where the *sole* theory of liability is *vicarious* liability. Although *Monell* was, of course, a section 1983 case involving a municipal subdivision of a state, appellee argues that precisely the same considerations that motivated the *Monell* Court are applicable in a *Bivens*-type action where the defendant is a municipality. Indeed, appellee argues that it would be anomalous to subject the sole "federal municipality" to a higher and distinct form of liability than that to which every other municipal entity in the country is subjected.

Accordingly, appellee argues that we should affirm the district court's dismissal of appellants' complaint for the most basic reason of all: regardless of the facts that appellants might adduce at trial, there is no possibility that they might recover on their federal claims, for the overwhelming weight of authority suggests that municipalities may not be subjected to vicarious liability for the constitutional torts of their employees. Appellee thus argues that, because appellants' federal claims involve no allegations that the District engaged in or countenanced any unconstitutional municipal policies, those claims must be dismissed. The parties are in apparent agreement that the dismissal of the entire complaint will stand or fall according to our disposition of the federal claims made by appellants, in accordance with the doctrines of pendent jurisdiction articulated in *United Mine Workers v. Gibbs.*

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[8] In *Monell* the Supreme Court held, of course, that Congress did not intend local governments to be subject to vicarious liability under 42 U.S.C. § 1983 for the acts of their employees. 436 U.S. at 691, 694.

II. *Respondeat Superior* LIABILITY UNDER A *Bivens* CLAIM

Were it necessary to reach the issues presented by appellants before this court, we would once again be pressed to determine whether a *Bivens*-type action lies in this circuit for violations of the Fifth Amendment; this question would appear to remain an open one, although comments of individual judges in the *Payne* case suggest the possibility of extending *Bivens* to cover rights guaranteed by the Fifth Amendment.[9] Moreover, with regard to *Bivens* actions based on any constitutional right, we have yet to resolve whether there exists any threshold beyond which a claim involving a constitutional tort must pass in order for that claim to survive a motion to dismiss. On one hand, "[n]ot every violation of local law may be transformed into a constitutional tort at the whim of a plaintiff simply because it was committed by a governmental agent under color of official authority." *Payne*, 559 F.2d at 829 (Tamm, J., concurring). On the other hand, as appellants argue, the fact that a common law tort action might exist on the same set of facts does not in itself foreclose the possibility of a concurrent federal cause of action.

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[9] As one judge noted in *Payne,* "[w]hile a few courts have refused to extend *Bivens* beyond the Fourth Amendment . . . this court has indicated a willingness to consider a broader application." 559 F.2d at 819 n.49 (opinion of Robinson, J.) (citations omitted). Another judge went even further and stated that "*Bell v. Hood* . . . clearly held that a federal court can grant money damages to redress the violation by a federal officer of a person's fifth amendment rights." *Id.* at 824 (Tamm, J., concurring).

In light, however, of the dispositive argument pressed by appellee in this action, we may leave for yet another day the thorny questions posed by appellants. A recent decision of this court, handed down after both the briefing and oral argument in the case at bar, has made clear that it is impossible as a matter of law for appellants to recover under any of the federal claims they have asserted.

In *Tarpley v. Greene*, No. 81-1246, slip op. (D.C. Cir. July 2, 1982), a unanimous panel of this court ruled that municipalities may not be subjected to *Bivens*-type liability where the sole theory of liability is *respondeat superior*. *Id.* at 20. The plaintiff in *Tarpley* had included among his claims the allegation that law enforcement personnel in the employ of the District of Columbia and two counties in Virginia and Maryland had, in the course of an investigation, unlawfully detained and assaulted him and had destroyed his property. *Id.* at 3-4. Proceeding both under section 1983 and directly under the Constitution for alleged violation of his Fourth and Fourteenth Amendment rights, Tarpley brought suit against the police officers involved in the incidents, the respective chiefs of police, and the three local governments in question. Vital for present purposes is the fact that only the police officers allegedly involved in the deprivation of Tarpley's rights were sued *directly* for the constitutional torts they were charged with committing; Tarpley sought to hold the chiefs of police and the local government entities liable solely on a theory of vicarious liability, not for any unconstitutional official policy or custom ordained at their behest. *Id.* at 5.

The district court in *Tarpley*, relying on the Supreme Court's *Monell* decision, granted the motions to dismiss filed by the two state counties and their respective chiefs of police. Because *Monell* proscribed the use of *respondeat superior* liability against municipalities under section 1983, the district court reasoned, a logical and necessary extension of the *Monell* doctrine barred such liability for *Bivens*-type claims. *See id.* at 4-5. With regard to the District of Columbia and its police chief, the district judge in *Tarpley* granted summary judgment against the plaintiff on all claims. Tarpley's section 1983 claims were rejected because that section did not apply to the District at the time of the alleged incidents; his constitutional claims were rejected primarily because of the absence of liability-creating acts by the police officers in question. The district judge also suggested that the *Monell* doctrine might independently bar recovery on Tarpley's constitutional claims because no official policy or custom implicating the District had been alleged. *See id.* at 7-8.

This court affirmed each of the *Tarpley* district court's rulings that are relevant for the purposes of the instant appeal. In particular, we held that the *Monell* doctrine extended that case's proscription of vicarious liability to claims brought under a *Bivens* theory. Writing for the court, Judge Edwards canvassed the appellate cases dealing with the issue and noted the unanimous conclusion drawn in the post-*Monell* decisions that municipalities are not subject to vicarious liability in *Bivens* actions. *Id.* at 17.[10] As Judge Edwards went on to note, vicarious liability was not at issue in *Bivens*, and nothing in *Bivens* or its progeny suggests that such liability must be available in actions based directly on the Constitution. *Id.* at 18. Moreover, the court in *Tarpley* noted that *Bivens*-type and section 1983 actions tend to be coextensive in the scope of rights protected—at least in those areas in which *Bivens* claims are recognized; thus, Judge Edwards concluded, it would be the height of anomaly to rule that

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[10] In light of the thorough canvassing of the relevant decisions conducted by Judge Edwards in *Tarpley*, we quote at some length from his opinion:

> [E]very Circuit that has considered this question following the decision in *Monell* has concluded that municipalities are not subject to *respondeat superior* liability in *Bivens* actions. *Ellis v. Blum*, 643 F.2d 68, 85 (2d Cir.

> local governments are not subject to *respondeat superior* liability on claims of constitutional violation brought under section 1983 and, at the same time, hold that municipalities may be held liable on a theory of *respondeat superior* on precisely the same constitutional claims brought directly under the Constitution.

Id. at 19 (footnote omitted).

1981); *Dean v. Gladney,* 621 F.2d 1331, 1334-37 (5th Cir. 1980), *cert. denied,* 450 U.S. 983 (1981); *Jones v. City of Memphis,* 586 F.2d 622, 624-25 (6th Cir. 1978), *cert. denied,* 440 U.S. 914 (1979); *Molina v. Richardson,* 578 F.2d 846, 847-54 (9th Cir.), *cert. denied,* 439 U.S. 1048 (1978); *see Cale v. City of Covington,* 586 F.2d 311, 317-18 (4th Cir. 1978) (no *Bivens* action available against municipalities after *Monell*); *cf. DeShields v. United States Parole Commission,* 593 F.2d 354, 356 (8th Cir. 1979) (no *respondeat superior* liability in *Bivens* claim against U.S. Parole Commission). Similarly, courts that considered the question prior to *Monell* also ruled that municipalities cannot be held liable on a *respondeat superior* theory in *Bivens* actions. *E.g., Turpin v. Mailet,* 579 F.2d 152, 166-67 (2d Cir.) (en banc), *vacated on other grounds,* 439 U.S. 974 (1978) (for reconsideration in light of *Monell*); *Jamison v. McCurrie,* 565 F.2d 483, 485 (7th Cir. 1977); *Kostka v. Hogg,* 560 F.2d 37, 41-44 (1st Cir. 1977); *cf. Nix v. Sweeney,* 573 F.2d 998, 1003 (8th Cir. 1978) (sovereign immunity protects municipalities from *respondeat superior* liability in *Bivens* claims).

Tarpley v. Greene, No. 81-1246, slip op. at 17 (D.C. Cir. July 2, 1982) (footnote omitted).

Quite aside from the obvious fact that *stare decisis* requires us to follow this recent decision, we find ourselves in complete agreement with Judge Edwards' analysis in *Tarpley*. It would be anomalous indeed if a plaintiff could secure broader relief under a *Bivens* theory than in a section 1983 claim based on precisely the same facts and the same legal theory. As did the *Tarpley* court, we feel that "a fair reading of the Court's [*Monell*] decision forecloses [the] contention that muncipalities may be made subject to *respondeat superior* liability in a *Bivens* action . . . ." *Id.* at 20. This court's decision in *Dellums v. Powell*, 566 F.2d 216 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), does not, moreover, compel a different result, notwithstanding its conclusion that the District of Columbia could be subjected to vicarious liability in a *Bivens* case. Close scrutiny of the rationale of *Dellums* indicates that this aspect of its holding was based on assumptions of law that are no longer apposite after *Monell*. Like the *Tarpley* court, we accordingly do not view *Dellums* as controlling in light of its pre-*Monell* genesis. *See Tarpley*, slip op. at 17 n.23.

The foregoing analysis makes manifest that appellants failed in their complaint to allege any federal claims for which relief could be supplied. The district judge quite properly dismissed their claims based on the civil rights statutes on the ground that section 1983 did not apply to officers of the District of Columbia until after the shooting that led to the suit had occurred and that sections 1985 and 1986 of Title 42 have never been applicable to District employees. *See supra* notes 3-4. The claims pressed by appellants based on *Bivens* and on an implied cause of action under the Fifth Amendment fail for want of any party who can be held liable directly under such theories; the failure of appellants to sue either of the officers allegedly responsible for the deprivation of their son's rights is fatal to their constitutional claims, for as we have noted above, it is now clear that the District of

Columbia—the only defendant in the district court—may not be subjected to *respondeat superior* liability in a *Bivens*-type action. Because appellants' federal claims against the District involved only allegations of vicarious liability, it is clear that those claims must fail.

We would note, finally, that appellee is not barred from proffering the argument that the case against it should be dismissed because it cannot be held vicariously liable, even though the district judge dismissed the case for want of subject matter jurisdiction. As the District notes, it specifically advanced the *respondeat superior* point in its trial brief and is not on appeal precluded from advancing the argument in urging affirmance because the district court failed to adopt it. Relying on the oft-cited dictum of the Supreme Court in *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970),[11] appellee correctly contends that it may rely on any ground in support of a lower court's judgment, regardless of whether that ground formed the basis of the lower court's decision. *See Arlinghaus v. Ritenour*, 622 F.2d 629, 638 (2d Cir. 1980); *United States v. General Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975); 9 Moore's Federal Practice ¶ 204.11[3] at 4-45 to 4-46 (2d ed. 1980). Because the unavailability of *respondeat superior* liability is now established beyond peradventure, we find no inequity in disposing of the case at bar on a ground other than that employed in its disposition by the district judge. *See Dandridge v. Williams*, 397 U.S. at 475 n.6.

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[11] The Supreme Court observed in *Dandridge* that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." 397 U.S. at 475 n.6. Although there would appear to be certain equitable limitations on the use of this doctrine—it presumably might not be appropriately employed where its use would deprive a party of all opportunity to respond to a particular argument—such limits are not implicated by the facts of the instant case.

III. CONCLUSION

The recent *Tarpley* decision of this court makes clear that the District of Columbia may not be held liable under a theory of *respondeat superior* for the constitutional torts of its employees prosecuted under a *Bivens*-type action. It is also clear that the claims pressed by appellants that are based on the civil rights statutes provide no cause of action to the Boykins. Accordingly, it is indisputable that all of the federal claims asserted by appellants were insufficient to survive a motion to dismiss for failure to state a claim for which relief may be granted. That the district judge in fact dismissed the *Bivens*-type claims for want of jurisdiction is academic; the pleadings and pretrial materials submitted by the parties demonstrate conclusively that appellants cannot possibly recover on any of their federal causes of action. As the federal claims must be dismissed, it is in turn clear that the district judge was correct in dismissing the pendent common law claims as well.

Thus, we conclude that appellants' complaint was properly dismissed by the district judge. As noted at the outset, the dismissal was, again quite properly, without prejudice to further proceedings based on the same facts and allegations. At oral argument we learned that related litigation has been filed in the District of Columbia Superior Court and is there pending resolution. By all accounts Superior Court appears the appropriate forum for this litigation, and we hope that appellants' complaint will be disposed of in a speedy and equitable fashion there.

Affirmed.

Kenneth Mundy 202-223-4470

I agree, that it is not a rational rule of order to forbid sleeping while permitting tenting, lying down, and maintaining a twenty-four hour presence.

In sum, in reviewing regulation of the time, place, and manner of expressive activity, I believe courts should draw no bright line between verbal speech and other comprehensible symbols of expression, or between "traditional communicative activit[y]"[15] and non-traditional modes of expression. While a more rational line perhaps might be drawn distinguishing unambiguously communicative activity, traditional or not, from activity that reflects a mixture of motives, I would not draw that line in this case. The non-communicative component of the mix reflected in CCNV's request for permission to sleep at the authorized symbolic campsite facilitates expression and should therefore attract ordering rules that are sensible, coherent, and sensitive to the speech interest involved. In my view, the Park Service determination does not satisfy that measurement. I therefore concur in the court's judgment.

WILKEY, with whom joined TAMM, MacKINNON, BORK, and SCALIA, Circuit Judges, dissenting:

This case raises a number of questions concerning the protection to be afforded symbolic speech and the extent to which, by neutrally drafted and applied regulations, the government may limit First Amendment access to a traditional public forum. In particular we must decide whether a general ban on camping in the Memorial core area parks of the District of Columbia can be applied to prevent camping that constitutes an integral and expressive part of a demonstration otherwise protected by the First Amendment.

I. BACKGROUND

The Community for Creative Non-Vi lence (CCNV), an unincorporated religio association working on behalf of homele persons, applied to the National Park Ser vice for a permit to hold a demonstration i Lafayette Park and on the Mall beginning 21 December 1982. CCNV proposed t erect sixty tents in which an estimated 15 demonstrators would sleep in order to draw attention to the plight of the homeless during winter.

The Park Service granted CCNV a permit to erect two symbolic tent cities, one on the Mall with forty tents, and one in Lafayette Park with twenty tents. Permission to sleep in the tents, however, was denied pursuant to Park Service regulations governing camping and the erection of temporary structures for living accommodation.[1]

CCNV and several homeless men then sued in district court for an injunction to prevent the Park Service from enforcing its regulations against them. They alleged four grounds in support of their suit: first, that the regulations are void for vagueness and overbreadth; second, that the regulations do not in fact prohibit their proposed demonstration; third, that the regulations have been discriminatorily enforced in violation of their First and Fifth Amendment rights; and, finally, that the regulations cannot be construed to prevent the demonstration without running afoul of the free speech guarantees of the First Amendment.

Following a hearing, the district court denied plaintiffs' motion for a preliminary injunction and for summary judgment, and instead granted summary judgment for the Park Service.[2] CCNV immediately filed a notice of appeal and a motion for an injunction pending appeal, which was denied by the district court. An emergency motion

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any activity they believe "will facilitate or improve the [demonstration]." *See* Wilkey Opinion at 613.

[15] Wilkey Opinion at 613.

[1] *See* 47 Fed.Reg. 24,299–306 (1982) (to be codified at 36 C.F.R. §§ 50.19, 50.27). Set out at pp. 617–618, *infra*.

[2] The district court delivered its judgment orally on 3 December 1982. Written Findings of Fact and Conclusions of Law followed on 9 December.

for injunction pending appeal was also denied by a panel of this court.[3] The appeal, however, was set for expedited *en banc* consideration to allow for a determination on the merits.

II. Preliminary Questions

Three of appellants' four contentions can be disposed of without difficulty. Indeed, a mere citation of the regulations at issue suffices to show that they prohibit the sleeping proposed by CCNV and that they are neither vague nor overbroad under applicable Supreme Court precedent. Furthermore, the district court explicitly found that the regulations have not been discriminatorily enforced. This finding is supported by undisputed evidence and therefore must be upheld.

The camping regulations of the National Capital Region were revised in June of 1982 after formal rulemaking proceedings.[4] The revisions responded to a recent decision of this court holding that a prior, almost identical demonstration proposed by CCNV was *not* prohibited by the regulations as then written.[5] The panel opinion relied upon a Policy Statement accompanying the regulations which drew a distinction between the permissible "use of symbolic campsites reasonably related to First Amendment activities" and impermissible "camping primarily for living accommodations ...." Noting that "the purpose of the symbolic campsite in Lafayette Park is 'primarily' to express the protestors' message and not to serve as a temporary solution to the problems of homeless people," the panel concluded that the regulations allowed appellants to sleep in the tents as an intrinsic part of their protest.[6]

No such statutory solution is available to us. As noted, the regulations were revised after the panel decision.[7] These revisions clarify the definition of the term "camping" as used in 36 C.F.R. § 50.27, which prohibits camping in park areas not designated as public campgrounds. The revisions also clarify section 50.19, which covers the use of temporary structures in connection with permitted demonstrations and special events.

As revised, 36 C.F.R. § 50.27(a) prohibits camping in park areas not designated as public camping grounds, and defines the terms as follows:

> Camping is defined as the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

Section 50.19(e)(8), as amended, permits the erection of temporary structures for the purpose of symbolizing a message or meeting logistical needs in conjunction with an authorized demonstration, but prohibits the use of temporary structures for camping outside of designated areas for

> living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all

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[3] *Community for Creative Non-Violence v. Watt,* Nos. 82–2445 and 82–2477 (D.C.Cir. 20 Dec. 1982).

[4] *See* 47 Fed.Reg. 24,299–306 (1982).

[5] *Community for Creative Non-Violence v. Watt,* 670 F.2d 1213 (1982).

[6] *Id.* at 1217.

[7] 47 Fed.Reg. at 24,299–306.

the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

There is no *single* activity that automatically triggers the application of these sections. Thus, someone might take a noontime nap in the park without violating them. Similarly, in conjunction with a demonstration one may erect a symbolic tent in which no one will actually be sleeping or may use "support service tents" for first aid facilities, lost children areas, or to shelter electrical and other sensitive equipment or displays.[8] Only when all the circumstances are taken into account can it be determined with certainty whether a particular person or group is "camping" within the meaning of the regulations.

The determination required is not a difficult one. We all have a common-sense understanding of what camping is, and the regulations aid that understanding by giving specific examples of activities that constitute camping "when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation. . . ." [9]

Appellants propose to erect tents and to occupy those tents, by sleeping in them at night, for the remainder of winter.[10] Given that "camping" is defined "regardless of the intent of the participants or the nature of any other activities in which they may also be engaging," what appellants propose is clearly camping. Appellants' First Amendment intent does not take them outside the scope of the regulations.

Furthermore, the regulations give fair notice of the prohibited conduct and provide sufficiently explicit standards to guide the discretion of law enforcement officials.[11] They are not impermissibly vague.[12] Neither are they overbroad. Appellants argue that their proposed camping constitutes symbolic speech meriting First Amendment protection. They further argue that the Park Service regulations impermissibly infringe upon that speech. These questions will be considered in due course.[13] But it is not necessary to decide them in order to reject appellants' overbreadth challenge.

When, as here, an enactment is directed at conduct rather than at speech, "overbreadth scrutiny has generally been somewhat less rigid" so long as the statute regulates the conduct in a "neutral, noncensorial manner." [14] "[T]he overbreadth of [such] a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." [15] Even assuming there is such a thing as "expressive camping" that merits First Amendment protection from incidental infringement, that expressive camping constitutes only a small fraction of the general camping prohibited by the regulations. It cannot be said that a general ban on camping is substantially overbroad simply because it encompasses occasional instances of expressive camping.

Finally, we agree with the finding of the district court that the Park Service has enforced its new regulations "in an even-

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[8] *Id.* at 24,305.

[9] *Id.* at 24,302.

[10] *See* Reply to Appellees' Opposition to Appellants' Emergency Motion for Injunction Pending Appeal and Opposition to Appellants' Motion for Summary Affirmance (Appellants' Reply Brief) at 3, 8–9.

[11] *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1971).

[12] This court has already concluded that a regulation prohibiting camping, defined in terms very similar to the current regulations, was not unconstitutionally vague. *See Vietnam Veterans Against the War v. Morton,* 506 F.2d 53, 59 (D.C.Cir.1974).

[13] *See* Part III, *infra.*

[14] *Broadrick v. Oklahoma,* 413 U.S. 601, 613–15, 93 S.Ct. 2908, 2916–2917, 37 L.Ed.2d 830 (1973).

[15] *Id.* at 615, 93 S.Ct. at 2917.

handed and reasonable manner."[16] This finding is based on and amply supported by undisputed facts contained in a number of exhibits and affidavits filed with the district court by the Park Service.

Appellants support their contention that the regulations are being enforced against them selectively and discriminatorily by referring to several past demonstrations in which sleeping allegedly occurred.[17] In judging the propriety of the grant of summary judgment for the Park Service, we must assume the truth of these factual allegations.[18] Even so, they fail to make out a claim of discriminatory enforcement in violation of the First and Fifth Amendments.

Some of the demonstrations relied upon by appellants[19] occurred before the effective date of the current revisions and are therefore largely beside the point. As for the three demonstrations taking place after that date, it is undisputed that in each instance the Park Service notified the participants that camping and the use of temporary structures for living accommodations was prohibited.[20] Furthermore, in the one case where the Park Service detected a violation of the regulations, it demanded compliance and the next day, after similar violations occurred, revoked the demonstration permit for non-compliance with the regulations and conditions of the permit.[21] A standard of reasonable, even-handed enforcement calls for no more.

At best appellants are able to cite two isolated instances of undiscovered violations of the regulations.[22] The district court rightly noted that this evidence failed to create a genuine issue of material fact.

> The existence of possible undiscovered violations of the law is not the material issue here. Rather, the issue is whether or not there existed a policy or practice by the Park Service of permitting activities by other persons in violation of the regulations. Since plaintiffs' evidence goes only to the former proposition, not to the latter, it fails to establish a policy of discriminatory enforcement.[23]

III. FIRST AMENDMENT CLAIM

We come, then, to the main focus of contention in this case. Appellants argue that the Park Service regulations, if construed to prohibit their proposed demonstration, impermissibly infringe upon rights guaranteed by the free speech clause of the First Amendment.

A. *Standard of Review*

As a preliminary matter, we must determine whether the camping proposed by appellants is properly considered "speech" for purposes of the First Amendment protec-

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[16] Findings of Fact and Conclusions of Law at 7.

[17] *See* Appellants' Reply Brief at 44–51.

[18] *See, e.g., Bishop v. Wood,* 426 U.S. 341, 347, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 684 (1976); *Abraham v. Graphic Arts Intern. Union,* 660 F.2d 811, 814–15 (D.C.Cir.1981).

[19] For example, appellants cite the 1968 "Resurrection City" demonstration and the 1979 "Farmers March." A Vietnam Veterans Against the WAR (VVAW) demonstration in early May relied on by appellants also took place prior to the effective date of the amended regulations. However, the Park Service applied the new regulations to that demonstration, yet still authorized at least some participants in the demonstration to "be asleep in the area at all times during the night." Letter from Park Service to VVAW dated 22 April 1982, *reprinted in* Record Document (RD) 5. In that case, however, the sleeping was incidental to an all-night vigil at a mock Vietnam War-era "firebase" at which the demonstrators took turns standing symbolic "guard duty." Since no tents or other structures were used by the VVAW, the Park Service determined that the demonstration did not constitute "camping" within the meaning of the new regulations.

[20] *See* Letter from Park Service to Assoc. of Community Organizations for Reform Now dated 18 June 1982; Letter from Park Service to Palestine Congress of North America dated 8 September 1982; Letter from Park Service to Arab Women's Council dated 28 July 1982, all *reprinted in* RD 5.

[21] Findings of Fact and Conclusions of Law at 8.

[22] *See* Appellants' Reply Brief at 54.

[23] Findings of Fact and Conclusions of Law at 20–21.

tion claimed here. Thus, in *United States v. O'Brien*,[24] the case principally relied upon by Judge Mikva to establish his standard of First Amendment scrutiny, the Supreme Court began its analysis as follows:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.

Since the Court in *O'Brien* found that the governmental prohibition satisfied even the heightened scrutiny appropriate for laws that incidentally infringe on protected expression, it was not constrained to go back and reexamine the validity of its assumption that First Amendment standards of scrutiny applied. Judge Mikva, however—at least if he intends to rely upon *O'Brien*—must do so. He must validate the credentials that admit sleep, in this case, to the realm of the First Amendment without providing a blanket pass to "an apparently limitless variety of conduct [that] can be labeled 'speech.' "[25] No easy task, and not one which Judge Mikva has in our view successfully executed.

The attempt is made in an earlier portion of the opinion,[26] where two responses are given. First, the "indicia of political expression . . . permeate CCNV's pointed use of the simple act of sleeping."[27] To determine communicativeness, Judge Mikva examines "the intent of the would-be communicator and the context in which his or her conduct takes place."[28] One might suppose from this, and from the quotation from Supreme Court authority which follows, that Judge Mikva means that here sleeping is a particularly *apt* method of expressing homelessness, the idea to be conveyed. Several pages later, however, the opinion abjures such an intent, warning (quite correctly, in our estimation) that basing the present decision upon CCNV's contention that "sleeping in its demonstration is uniquely deserving of first amendment protection because it directly embodies the group's message . . . would require the government to draw distinctions among groups desiring to express themselves through sleeping depending on the subject matter or content of their message and its alleged relationship to sleep . . . ."[29] We add that it would also require the Park Service, and ultimately the courts, to make judgments that are more appropriate for Ingmar Bergman and Andy Warhol.

But if this symbolism-evaluation is not what Judge Mikva has in mind, then we are at a loss to understand the point. Does it mean that, *since* the particular activity of sleeping *is* expressive in this case (the one-and-only time we will engage in symbolism-evaluation for this particular category of conduct) it must *always* be assumed to be expressive in the future—so that hereafter one can sleep in the parks to protest war or to protest peace, to protest the arms race or to protest unilateral disarmament, all indiscriminately under the protection of the First Amendment?[30]

Judge Mikva's second basis for avoiding the preliminary inquiry of *O'Brien* is that the sleeping is part of a demonstration that is itself sufficiently communicative to implicate the First Amendment. In other words, "even were we not to focus on the peculiarly expressive nature of sleeping, first amendment scrutiny would still be implicat-

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[24] *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968).

[25] *Id.*

[26] Mikva Op. at 591-594.

[27] *Id.* at 593.

[28] *Id.* at 592.

[29] *Id.* at 594.

[30] *See id.* at n. 16 ("demonstrators should be held to no higher standard than the advancement of a plausible contention that their conduct is intended to, and in the context of their demonstration likely will, express a message").

ed."[31] The idea seems to be that the First Amendment gives CCNV the freedom to shape the nature of its own demonstration and, therefore, a higher standard must be applied to justify the suppression of all requested elements of that demonstration—*including* those that are not even intended to be independently communicative.[32] We cannot accept this reasoning, which suggests that since, for example, a protest march (a traditional form of expressive conduct) cannot be banned without meeting the high First Amendment standards applicable to incidental infringements on speech, neither can any of the other activities which the organizing group believes will facilitate or improve the march.

We think that is plainly wrong. Not a whit more justification is needed to ban spitting in the street by a parade of tobacco farmers protesting a new tax on chewing tobacco than is needed to prevent such activity by the public at large. Any group's freedom to shape the nature of its own demonstration is limited by the well-established permissibility of "time, place *and manner*" limitations—the reasonableness of which is established so long as the First Amendment activity itself (the speech, the pamphleteering, the parade) is not needlessly impeded, regardless of the effect on ancillary phenomena. It is hard to believe that the limiting language in *O'Brien,* quoted above, means no more than that inherently unexpressive conduct need only be joined with expressive conduct or speech in order to qualify for First Amendment protection.

The Supreme Court cases, it must be acknowledged, do not provide guidance as to what conduct beyond traditional communicative activities such as marching and picketing may qualify as "speech." It might be suggested that only such traditional activities qualify for purposes of avoiding a general prohibition not directed at communicative content—while virtually all conduct is "speech" for purposes of avoiding a proscription specifically designed to suppress expressive connotation.[33] While this analysis may be consistent with the holdings of the Court, it is difficult to square with the fact that the *O'Brien* test itself (applied only after conduct has been assumed entitled to full "free speech" protection), contains a step that inquires into the communication-suppressing nature of the law. Unlike Judge Mikva, we find it unnecessary to solve this dilemma in the present case. Like the Supreme Court in *O'Brien,* we find that even assuming the applicability of the more demanding First Amendment standard of review, the regulations here pass muster.[34]

The standard of review provided by *O'Brien* is as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers a substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.[35]

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[31] *Id.* at 594.

[32] *Id.* ("whatever the particular form of the protestors' presence at night, their presence itself implicates the first amendment").

[33] *See, e.g., Spence v. Washington,* 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (per curiam); *Tinker v. Des Moines School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

[34] It may well always be true that conduct which should not in the first place have been accorded full First Amendment "speech" protection will, even assuming such protection, readily be proscribable under the *O'Brien* test. Applying this test on a case-by-case basis does, however, impose a considerable burden upon administrators and the courts, and may produce erroneous judgment which (so long as they are not adverse to demonstrators) are not appealable to the courts. We do not, therefore, deprecate the value of the more direct approach which both the *O'Brien* court and we have avoided; but in the absence of further clarification from the Supreme Court we take the safer course for the present.

[35] 391 U.S. at 377, 88 S.Ct. at 1679.

The first requirement, that the regulation be within the constitutional power of the government, is rarely a problem. The second and fourth requirements come together to constitute a balancing test, as discussed below.[36] Before one even reaches that balancing test, however, the interest offered by the government to support its regulation must meet the threshold requirement that it be "unrelated to the suppression of free expression." In other words, any burden imposed on free expression must be incidental to the prevention of a harm that arises regardless whether any message is conveyed. To illustrate, an attempt to curtail littering by banning handbills is not directed at any message to be conveyed. The feared harm would arise even if the handbills were blank.[37] Similarly, a ban on sound trucks is designed to prevent noisy disturbances, a harm that would arise even if the sound truck merely emitted static or other meaningless sounds.[38] An attempt to curtail the incitement of lawless action, on the other hand, is directed at a harm arising from the specific viewpoint expressed.[39] Similarly, a ban on foul language is concerned with the effects of the ideas or emotions expressed on the minds or conduct of those listening.[40] In these latter cases, the regulation will not survive judicial scrutiny unless the proscribed expression falls into one of several narrowly defined, unprotected categories.[41]

In the former set of cases, where the threshold test is met, then under *O'Brien* a balancing test is proper: the state must counterbalance any incidental infringement on free speech by showing that the regulation narrowly pursues a substantial governmental interest. This is properly characterized as a "balancing" test, because the greater protection that could be afforded speech by a less restrictive alternative must be balanced against that alternative's loss of efficiency in achieving the government's objective.[42]

In this case, the governmental interest alleged, the protection of the parks in the Memorial core area from physical and aesthetic damage caused by camping, is clearly unrelated to the suppression of free expression. The harm is the same whether appellants hope to express a message by camping or not. Thus, the court must balance the substantiality of the government's interest in preventing camping against the incidental infringement on free speech, taking due note of the possibility of any less restrictive alternative.

B. *Application of Standard*

The three concepts upon which this case turns, "substantial interest," "incidental infringement," and "less restrictive alternative," are inherently vague. However, enough can be said about each, as applied to this case, to leave no doubt as to the proper result.

1. *Substantial Interest*

Our first responsibility is to determine the exact nature and scope of the governmental interest called into question by this case. It is easy to make a mistake here,

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[36] *See* p. 614, *infra*.

[37] *See Schneider v. New Jersey,* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Ely, *Flag Desecration: A Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 Harv.L.Rev. 1482, 1486–87 (1975).

[38] *See Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

[39] *See Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam).

[40] *See Cohen v. California,* 403 U.S. 15, 21–22, 91 S.Ct. 1780, 1786–1787, 29 L.Ed.2d 284 (1971).

[41] *See, e.g., Paris Adult Theater I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) (obscenity); *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam) (advocacy of imminent lawless action); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) (fighting words).

[42] *See* Ely, *supra* note 37, at 1482–90; Farber, *Content Regulation and the First Amendment: A Revisionist View,* 68 Geo.L.J. 727, 742 n. 83 (1980).

improperly expanding or contracting the scope of that interest. Two cautions are necessary. We should look to the regulations as *applied* to this case to determine the relevant class of activities that the government is interested in banning.[43] But we should not, in judging the substantiality of the interest underlying that ban, limit our consideration to the harms that might be caused by a particular sub-class of persons, such as appellants, desiring to perform those activities. In other words, we look to the overall benefit to be had from the general application of the regulations, but our understanding of the "regulations" is refined by reference to the activities in which appellants actually propose to engage.

Some of our colleagues seem to feel that in judging the substantiality of the government's interest the proper focus in this case is on the incidental harm that would be caused by allowing *these appellants* to sleep in the park as part of their proposed demonstration. They are mesmerized by the following scenario: the Park Service has already issued a demonstration permit that will allow appellants to construct a "symbolic city" and to maintain a round-the-clock presence at the site. Appellants may put up tents. They can place within those tents sleeping bags, cots, and other bedding materials. They can sit in the tents twenty-four hours a day. They can even lie down, close their eyes and feign sleep. The only thing they cannot do is actually fall asleep. What additional harm to the parks could possibly be caused by allowing appellants actually to sleep rather than merely feigning sleep?

This approach to the question at issue here misconceives the relevant First Amendment inquiry. The apparent absence of harm that would be caused by granting these appellants an exemption from the no-camping regulations may indicate that we should look for a possible, less restrictive alternative to the present regulations. It does not, however, in any way undermine the substantiality of the interest supporting the regulations as now written and applied generally by the Park Service. The Supreme Court has stated explicitly that in judging the substantiality of the government's interest we must look to the interest supporting the law generally, *not* the interest to be served by applying it in any particular case. The alternative is to nickel and dime every regulation to death.

The point was made most clearly and emphatically in the recent case of *Heffron v. Int'l Soc. for Krishna Consc.*[44] In that case a rule of the Minnesota Agricultural Society, a public corporation that operates the annual state fair, required all persons, groups or firms desiring to sell, exhibit, or distribute materials during the fair to do so only from fixed locations. The International Society for Krishna Consciousness, Inc. (ISKCON) claimed the rule violated their First Amendment rights because it suppressed the practice of Sankirtan, a religious ritual that enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. The Minnesota Supreme Court agreed.

> The Minnesota Supreme Court recognized that the state's interest in the orderly movement of a large crowd and in avoiding congestion was substantial and that rule 6.05 furthered that interest significantly. Nevertheless, the Minnesota Supreme Court declared that the case did not turn on the "importance of the state's undeniable interest in preventing the widespread disorder that would surely exist if no regulation such as rule 6.05 were in effect" but upon the significance of the state's interest in avoiding whatever disorder would likely result from granting members of ISKCON an exemption

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[43] The absurdities to which an alternative approach could lead are readily apparent. The government could make any regulation invincible by tacking on a prohibition that is undoubtedly supported by a substantial interest but has nothing to do with the usual application of the regulation, such as "Camping and the detonation of hand grenades is forbidden in the parks of the Memorial core area."

[44] 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

from the rule. Approaching the case in this way, the court concluded that although some disruption would occur from such an exemption, it was not of sufficient concern to warrant confining the Krishnas to a booth.[45]

The United States Supreme Court, *applying free speech* (not freedom of religion) *principles*,[46] rejected this approach and upheld the rule. "The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON." [47]

A similar mistake would be to focus our attention at this time solely on the harm that would be caused by allowing "First Amendment" camping (*i.e.*, camping by any group, not just appellants, for whom the camping was an integral part of the message to be conveyed). Again, such an inquiry might indicate that we should look for a possible, less restrictive alternative to the present regulations. But it bears no relevance to the initial question of whether the regulations as now written and applied are supported by a substantial interest. Thus, in *United States v. O'Brien*,[48] the court focused on the government's interest generally in preventing the destruction or mutilization of registration certificates, whether or not that destruction or mutilization is for a First Amendment purpose. Again, any other approach would nickel and dime every regulation to death.

Thus, in the instant case, we must not measure the substantiality of the governmental interest by looking solely to the harm that might be caused by allowing these particular appellants to sleep in the park. Nor may we measure that interest by looking only to the harm that would be caused by allowing "First Amendment" camping. Rather, we must look to the interest in preventing camping by all classes of persons, whatever their motive.

Having fixed the relevant class of persons by reference to whom the interest in banning camping should be judged, we must still be very careful in stating what we mean by "camping." In this sense, the claims of these particular appellants are relevant. They do not propose to build fires, dig latrines, cook, etc. They propose only to erect tents, lay out bedding materials, and sleep through the nights for an extended period. Thus, we must judge the substantiality of the government's interest in preventing this class of activities. We do not add cooking, building fires, and digging latrines as make-weights because, even though they are forbidden by the regulations, appellants disclaim any intention of such activity.

The point made above is merely that we should not limit our consideration to a *subclass of persons* desiring to perform these activities, such as appellants alone or, even, all those with a First Amendment purpose. But we must and do limit our attention to the *class of activities* actually called into question by this case. Thus, "camping" as used in the remainder of this opinion is limited to such activities as erecting tents or other structures, laying out blankets, sleeping bags, and other bedding materials, and sleeping.

The governmental interest called into question by this case is the prevention of harm that would be caused by camping, in the above sense, in the Memorial core area parks. However, a round-the-clock presence and the erection of symbolic structures, including tents, is allowed by the regulations in conjunction with a demonstration. Thus, the governmental interest is limited to the *incremental harm* which would be caused by permitting camping generally (*i.e.*, not just for First Amendment purposes) *in addition to* the erection of tents and a 24-hour presence for demonstration purposes.[49]

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45. *Id.* at 651–52, 101 S.Ct. at 2566–2567.

46. *Id.* at 652–53, 101 S.Ct. at 2566–2568.

47. *Id.* at 652, 101 S.Ct. at 2566.

48. 391 U.S. at 378–82, 88 S.Ct. at 1679–1681.

49. Judge Edwards suggests that "the only matter in dispute is *sleeping*," since "the Park Service has not sought to ban the appellants from erecting tents, laying out blankets or bed-

Even as so stated, however, the substantiality of the governmental interest cannot be doubted. The proverbial "straw that broke the camel's back" is a valid and useful concept. The Park Service may in all good faith strive to be lenient, but nevertheless it is entitled to draw the line somewhere. If camping, *whatever the purpose,* were allowed in the parks of the Memorial core area, those parks would be overrun by campers during the summer months—the grass would be ruined, litter and human waste would abound, and the pleasure non-campers take in those parks would be ruined.

No such consequences can be anticipated from allowing symbolic structures and a 24-hour presence in the parks. Citizens are only likely to avail themselves of the latter privileges in order to express themselves on pressing issues, whereas camping would be useful to any tourist or visitor interested in minimizing expenses. Furthermore, the potential harm to the parks from persons who actually live there for their own convenience, persons who don't go home to eat, to wash, to sleep, to answer nature's call, etc., exceeds that to be expected from persons erecting symbolic structures or maintaining a wakeful vigil for First Amendment purposes.

It is important once again to recall that we are not yet concerned with the possibility of a less restrictive alternative that would permit First Amendment camping, while denying permission to all other campers. The regulations as written ban all camping, and it is the interest underlying that ban that we must now weigh. As the Park Service has noted, the parks in the Memorial core area, including the Mall and Lafayette Park, are simply unsuited for camping.[50] To permit camping would deprive other groups of the right to use nationally significant space. It would cause significant damage to park resources and a substantial increase in costs for park restoration, sanitary facilities, and extra park personnel.[51] Accordingly, the governmental interest supporting the ban on camping and the erection of structures for living accommodation is substantial.

2. *Incidental Infringement on Speech*

In most of the symbolic speech cases, the activity that the government attempted to suppress was inherently expressive. Ninety-nine out of a hundred people who purposely burn their draft cards,[52] wear arm bands,[53] or superimpose a peace symbol on the flag,[54] will do so in order to express something thereby. Thus, a prohibition of that activity can have a substantial, even if incidental, impact on speech.

Camping as symbolic speech presents a very different case. Camping in the park has a great deal of independent signifi-

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ding, or even maintaining a 24-hour presence." Edwards Op. at n. 1. *See also id.* at 603. We think this is an unduly narrow characterization of what is at stake in this case. The regulations permit a round-the-clock presence and the erection of symbolic structures, including tents, *for demonstration purposes.* They do not permit a 24-hour presence or the erection of any structures *for purposes of living accommodation.* As we explain below, *see* Section III(B)(3), the only way the Park Service can maintain this distinction is by refusing to allow demonstrators to sleep in addition to their other activities. It is sleep that would provide the incentive for nondemonstrators and, perhaps, many demonstrators to erect structures and remain through the night. Unused tents and a nighttime vigil will only be employed for purposes of expression. If the convenience of sleep were added, the Park Service would be unable to distinguish between the symbolic and non-symbolic use of structures and nighttime vigils. Thus, the broader regulatory scheme, which forbids nondemonstrators to erect structures and remain round-the-clock as well as forbids all persons to sleep, is at stake in this case. We will, therefore, continue to speak of "camping," and not merely "sleeping."

[50] 47 Fed.Reg. at 24,301.

[51] Findings of Fact and Conclusions of Law at 6.

[52] *See, e.g., United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[53] *See, e.g., Tinker v. Des Moines School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

[54] *Spence v. Washington,* 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (per curiam).

cance. It is not a traditional form of speech. It has expressive First Amendment value only in a very limited set of circumstances.[55] Thus, if camping in the Memorial core area parks were permitted, the vast majority of those availing themselves of the privilege would not be intending to express anything thereby. Conversely, the incidental infringement on speech caused by an absolute ban on camping in these areas is simply not that great relative to the government's interest in preventing camping generally.

Appellants may well have hit upon the most expressive means of conveying their message. But they have also stated explicitly that their desire to camp in the parks is based *not* just on the expressive nature of those activities under the peculiar facts of this case, *but also* on the fact that camping would facilitate the expression both by attracting demonstrators and by capturing media attention. On the former point, appellants' original application is clear. "Without the incentive of sleeping space or a hot meal, the homeless would not come to the site." [56] This statement is constantly echoed in the papers filed with this court.[57] The latter point follows from the former. Without homeless people coming to demonstrate the poignancy of their plight, the media value of the message is sadly diminished, despite the unabated poignancy of that plight.[58]

The Supreme Court has noted time and again that although the First Amendment guarantees individuals and groups the right to deliver their message, it does not guarantee any right to deliver that message in the most effective manner possible.[59] It does not guarantee media attention. Nor does it guarantee circumstances that will attract the largest number of demonstrators.[60] Appellants' concerns in this case are not limited to a fear that their message, purely in terms of its content, will be diluted. They fear at least as much that the effect of their message, however well expressed, will be diminished.

Of course, we must not make the "category mistake" noted above in conjunction with the substantial interest test. Just as the substantiality of the government's interest must be judged by the effect of the law on all persons, so, too, the extent to which it infringes upon speech must be judged by the effect of the law on all persons, and not just by its effect on the appellant. However, the conjunction of the facilitative and expressive aspects of camping in this case is likely to be paralleled in all other First Amendment camping cases. The convenience of the demonstrators and the media value of their message will rival in importance the First Amendment aspects of the camping and thereby further diminish the claim that their First Amendment interest is substantial relative to the government's interest in preventing camping generally.

Judge Edwards correctly notes that "a message is not less deserving of First Amendment protection merely because the manner used to express it serves other

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[55] However, as we shall see, pp. 620–622, it would be impossible to fashion "narrow, objective, and definite" standards that would limit permission to camp to those few cases where camping is expressive.

[56] Letter from CCNV to Park Service (undated), *reprinted in* RD 5.

[57] Appellants' Emergency Motion for Injunction Pending Appeal at 21–22; Appellants' Reply Brief at 6–7.

[58] *See* Appellants' Emergency Motion for Injunction Pending Appeal at 21–22; Appellants' Reply Brief at 6–7.

[59] *See, e.g., Heffron v. Int'l Soc. for Krishna Consc.,* 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981); *Adderly v. Florida,* 385 U.S. 39, 47–48, 87 S.Ct. 242, 247–248, 17 L.Ed.2d 149 (1966); *Lloyd Corp. v. Tanner,* 407 U.S. 551, 567, 92 S.Ct. 2219, 2228, 33 L.Ed.2d 131 (1972).

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> What the litigant's press agent seeks and what the public interest requires differ widely. Although every man is entitled to make his remonstrance, no man is entitled to make such a remonstrance that it will be carried on all three television networks.

Vietnam Veterans Against the War v. Morton, 506 F.2d 53, 58 (D.C.Cir.1974).

needs of the demonstrators."[61] But where there are plenty of alternative ways to express the same message—ways which, though less convenient to the demonstrators, are not fraught with the same harms to legitimate governmental interests—the First Amendment does not extend special protection to the means chosen by the demonstrators, especially where those means are chosen as much for convenience as for expressive value. To repeat, the First Amendment does not guarantee any right to deliver a message in the most effective manner possible. Nor does it guarantee any right to deliver a message in the most convenient way possible.

In sum, the substantiality of the government's interest in preventing camping generally in the Memorial core area parks appears to counterbalance the occasional, incidental infringement on speech caused by the regulations.

3. *Less Restrictive Alternative*

It is important to recognize that appellants wish to conduct their demonstration in a park, a forum traditionally open to the public "for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[62] Modes of First Amendment activity, such as leafletting and demonstrating, which can be banned from certain locations, such as courthouses,[63] jails,[64] and private shopping centers,[65] cannot be abridged or denied in traditional public forums such as the streets[66] and parks.[67] The right to speak in a public forum may be regulated in the interest of all, "but it must not, in the guise of regulation, be abridged or denied."[68]

Appellants argue, relying on this notion that the park is a public forum, that the government must permit exceptions to its ban on camping where the camping is an integral part of First Amendment expression. In other words, appellants argue that the mere fact that the ban is neutral and supported by a substantial governmental interest is insufficient. Some affirmative accommodation of First Amendment interests is necessary in a public forum.

> The total ban on "camping" sweeps within its purview First Amendment activities that pose no danger to the alleged governmental interest. Prohibition of peaceful sleeping inside lawfully erected tents as part of a demonstration serves no purpose other than to impermissibly suppress free expression.[69]

Anatole France once said: "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[70] The sarcasm is salutory. Appellants are among the most helpless members of our society. They are likely to be uneducated and inarticulate. If it were possible to accommodate their most effective mode of expression without exposing the parks to the harms anticipated by the regulation, then the First Amendment might well require that accommodation. The crucial and dispositive aspect of this case is that there is *no possibility of a constitutionally acceptable less restrictive alternative.* The Park

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[61] Edwards op. at 602–603.

[62] *Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939) (Roberts, J., concurring).

[63] *See, e.g., Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965).

[64] *See, e.g., Adderly v. Florida,* 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

[65] *See, e.g., Lloyd Corp. v. Tanner,* 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972).

[66] *See, e.g., Schneider v. New Jersey,* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

[67] *See, e.g., Niemotko v. Maryland,* 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); *Saia v. New York,* 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948).

[68] *Hague v. CIO,* 307 U.S. at 516, 59 S.Ct. at 964.

[69] Appellants' Reply Brief at 63.

[70] A. France, Le Lys Rouge (1894) ch. 7.

Service must either allow all camping or abide by a flat-out ban. Any intermediate position designed to accommodate "First Amendment camping" would run afoul of the proscriptions against discretionary screening contained in a long line of Supreme Court cases.[71] The Supreme Court has, in effect, endorsed Anatole France's "majestic equality" as applied to free speech because only totally objective standards will suffice in this area, whatever differentiations there may be in welfare policies.

The teaching of this line of cases is that licensing regulations, to pass constitutional scrutiny, must contain "narrow, objective, and definite standards to guide the licensing authority,"[72] and thereby protect against arbitrary action or *de facto* censorship of certain points of view. It is just such standards that would be impossible to formulate if the court tried to carve a First Amendment exception out of the ban on camping. First Amendment standards cannot themselves be used to state an exception to a neutral regulation of conduct.

The force of this point can be seen by considering the following three examples, asking in each instance whether the Park Service would have to grant a permit to camp under a judicially mandated First Amendment exception to the ban on camping.

> (1) A group of tourists comes to D.C. during the summer. Rather than pay to stay in a hotel, they apply for a permit to camp on the Mall "to dramatize and protest against the high cost of hotels."

At oral argument appellants stated that this would be a "frivolous case." We agree. But according to what standard is the Park Service to deny the permit? The Park Service cannot be permitted to discriminate between applicants based on the supposed substantiality of their message. That would be content screening in its most blatant form. "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.[73] Nor could the Park Service screen applicants on the basis of their sincerity, their commitment to the message they are trying to convey. It is not for the Park Service to decide who really believes that high hotel prices are harmful to the republic and should be regulated by government and who just wants a free place to sleep.

The problem stems from the fact, noted above, that many people, without any First Amendment purpose, would like to camp. The benefits of camping in a convenient location on the Mall will provide them with an incentive to offer a First Amendment pretext for the camping. On the other hand, few would go to the trouble of erecting a temporary structure on the Mall or maintaining a wakeful 24-hour vigil unless they wanted to express *something* thereby, however inane or frivolous. There could be little other reason for erecting such structures or maintaining such a vigil. Thus, the question of sincerity doesn't arise, and, consequently, the Park Service need not distinguish between substantial and frivolous messages. Applicants for a permit are left to determine for themselves whether their message is "significant" enough to be worth the trouble.

Where camping is concerned the problem of pretextual or frivolous speech is much more important. Presumably, there are a great many people who would like to camp on the Mall or in Lafayette Park, at least during the summer, and would do so if permitted. If we force the Park Service to

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[71] *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150–153, 89 S.Ct. 935, 938–940, 22 L.Ed.2d 162 (1969); *Niemotko v. Maryland,* 340 U.S. 268, 271–72, 71 S.Ct. 325, 327–328, 95 L.Ed. 267 (1951); *Kunz v. New York,* 340 U.S. 290, 294, 71 S.Ct. 312, 315, 95 L.Ed. 280 (1951); *Lovell v. Griffin,* 303 U.S. 444, 450–51, 58 S.Ct. 666, 668–669, 82 L.Ed. 949 (1938).

[72] *Shuttlesworth v. City of Birmingham,* 394 U.S. at 151, 89 S.Ct. at 938.

[73] *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972). *See also Carey v. Brown,* 447 U.S. 455, 466–67, 100 S.Ct. 2286, 2293–2294, 65 L.Ed.2d 263 (1980).

open the gate for this group because of their sincerity and the substantiality of their message, we will force the Park Service either to screen applicants on that basis or to permit anyone to camp who is willing to offer a First Amendment rationalization, however ludicrous or improbable.

> (2) A citizen, in order to demonstrate the depth of his commitment to arms control, resolves to remain in Lafayette Park until all nuclear weapons are destroyed.

Here the message is obviously substantial, and the citizen's commitment to it we may assume is sincere. But the Park Service, to keep him from making Lafayette Park his home for the rest of his life, would have to deny the permit on the grounds that the mode of expression (camping) is not sufficiently related to the message to be conveyed to justify giving the citizen permanent squatter's rights. In other words, he can make his point by other, less intrusive means. But how is the Park Service to make such a determination with any clarity? Suppose the citizen's tent were shaped like a coffin and he maintained that his constant presence was necessary to dramatize the unnatural death that awaits us all. Can we really expect the Park Service in issuing a permit to decide in each case whether the fit between the means employed and the message to be conveyed is close enough to justify the particular means? We cannot; at least not without running afoul of the constitutional requirement that standards be "narrow, objective, and definite."

The point of these two examples is that First Amendment standards cannot themselves be used to state an exception to a neutral regulation of conduct. The First Amendment does not provide sufficiently "narrow, objective and definite standards" to guide a licensing authority. We cannot simply say: First Amendment camping may not be banned, even though all other camping is banned.

The final example presents an extreme case of the frivolous speech problem. It demonstrates that any attempt to create an explicit First Amendment exception to a neutral regulation of conduct itself provides a foolproof means of evading that regulation.

> (3) This court rules that the Park Service must permit a First Amendment exception to its ban on camping in the Memorial core area parks. A group of citizens here on holiday, with homes of their own and no particular gripe with hotel prices (other than a disinclination to pay them), applies for a First Amendment camping permit "to demonstrate the absurdity of the holding of the D.C. Circuit Court of Appeals that allows us to camp on the Mall."

Here, the message is substantial, the parties might well be sincere, and the means-end fit is perfect. The Park Service, it appears, would have no choice but to issue the permit. In other words, if we create a First Amendment exception to the ban on camping, the exception will completely swallow the rule. Anyone and everyone who is willing to apply for a permit and recite the above First Amendment purpose must be allowed to camp, subject to a first come-first served limitation.[74]

In sum, it is not possible to construct a less restrictive alternative to the flat-out ban on camping at issue here. Thus, given that the governmental interest supporting the total ban is substantial and that the

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[74] Judge Mikva chides us for ignoring the "obvious alternative of revoking a demonstration's permit should its participants engage in non-sleep 'camping' activities." Mikva Op. at n. 32. It is not clear what he means by this, however, in light of his earlier acknowledgement that the activities proposed by appellants themselves constitute "camping" within the meaning of the new regulations. *See id.* at 591. His meaning is further confounded by a citation from our opinion which he says "underscore[s] the potential effectiveness of permit revocation as a means of enforcing the Park Service's anti-camping regulations ...." *Id.* at n. 32. It is precisely those regulations which Judge Mikva's opinion disables. If they can't be used to *deny* a permit for "First Amendment camping" (a category, we have explained, that cannot be given viable boundaries), then surely they can't be used to *revoke* a permit for that same camping.

incidental infringement on free expression, relative to the valid purposes served by the rule, is not significant, the regulation should be upheld.

As evidenced by the four opinions reflecting the views of our six colleagues agreeing on the result, it seems apparent that they are quite sure that these appellants should be allowed to sleep in Lafayette Park, but they have had great difficulty in figuring out why. We five in dissent, assuming that free speech principles apply, find no difficulty in sustaining this Park Service regulation permitting every type of communicative action, but drawing the line at "camping," *i.e.,* actually occupying living accommodations in Lafayette Park 24 hours a day for days on end. *United States v. O'Brien, supra; Heffron v. Int'l Soc. for Krishna Consc., supra.*

SCALIA, Circuit Judge, dissenting, with whom Circuit Judges MacKINNON and BORK concur:

I concur with the principal dissent in this case because I agree that, if traditional First Amendment analysis is applied to this sleeping, on the assumption that it is a fully protected form of expression, the appellants would nonetheless lose. I write separately to express my willingness to grasp the nettle which the principal dissent leaves untouched, and which the opinions supporting the court's disposition consider untouchable—that is, flatly to deny that sleeping is or can ever be speech for First Amendment purposes. That this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding.

I start from the premise that when the Constitution said "speech" it meant speech and not all forms of expression. Otherwise, it would have been unnecessary to address "freedom of the press" separately—or, for that matter, "freedom of assembly," which was obviously directed at facilitating expression. The effect of the speech and press guarantees is to provide special protection against all laws that impinge upon spoken or written communication (which I will, for the sake of simplicity, refer to generically as "speech") even if they do so for purposes that have nothing to do with communication, such as the suppression of noise or the elimination of litter. But to extend *equivalent* protection against laws that affect actions which happen to be conducted for the purpose of "making a point" is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate.

The cases find within the First Amendment some protection for "expressive conduct" apart from spoken and written thought. The nature and effect of that protection, however, is quite different from the guarantee of freedom of speech narrowly speaking. It involves a significantly different balancing of private rights and public interests, and does not always call for the detailed "First Amendment analysis" characteristic of the speech cases and applied by the majority opinions here. Specifically, what might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires. But a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause.[1] In other words, the only "First Amendment analysis"[2] applicable to laws

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[1] For a description of those requirements, *see, e.g., City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976).

[2] I refer here only to the First Amendment's guarantees of freedom of speech and press—not to other guarantees, such as freedom of religion or the right of personal autonomy or privacy which some cases have rested in part upon the First Amendment. *See, e.g., Stanley*

that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court *then* proceeds to determine whether there is substantial justification for the proscription, just as it does in free-speech cases.

Thus, the First Amendment's protection of free *speech* invalidates laws that happen to inhibit speech even though they are directed at some other activity (sound amplification,[3] campaign contributions,[4] littering [5]). The more limited guarantee of freedom of expression, by contrast, does not apply to accidental intrusion upon expressiveness but only to purposeful restraint of expression. It would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists.

I believe the foregoing analysis is consistent with all of the Supreme Court's holdings in this field. I would be content to consign marching and picketing, as the principal dissent suggests, to a category of traditionally expressive conduct which itself qualifies as speech, and thus does not require a showing of expression-suppressing intent. I do not think that exception is necessary, however, to explain the cases. The marching and picketing holdings represent not conduct protected because it is in itself expressive, but rather what the cases and commentators call "speech-plus" [6]—conduct "intertwined" [7] or "intermingled" [8] *with speech.* The union organizer, for example, cannot convey his spoken or written message to the relevant audience if he is not allowed to be present at the entrance to the employer's place of business. Those cases differ only in degree from the sound-amplification, campaign-contribution and littering cases referred to above: They deal with laws which, by prohibiting an essential concomitant of effective speech, infringe upon speech itself, and thus call forth the full First Amendment standard of justification.[9] (It may be difficult to deter-

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v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); *Griswold v. Connecticut,* 381 U.S. 479, 482–83, 85 S.Ct. 1678, 1680–1681, 14 L.Ed.2d 510 (1965).

[3] *See Saia v. New York,* 334 U.S. 558, 561, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574 (1948) ("Loudspeakers are today indispensable instruments of effective public speech").

[4] *See Buckley v. Valeo,* 424 U.S. 1, 16, 96 S.Ct. 612, 633, 46 L.Ed.2d 659 (1976):

> We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien.* The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.

[5] *See Schneider v. State,* 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939):

> It is argued that the circumstance that in the actual enforcement of the Milwaukee ordinance the distributor is arrested only if those who receive the literature throw it in the streets, renders it valid. But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

[6] *See American Radio Ass'n v. Mobile Steamship Ass'n,* 419 U.S. 215, 231, 95 S.Ct. 409, 418, 42 L.Ed.2d 911 (1974); W. Lockhart, Y. Kamisar, & J. Choper, Constitutional Law 1136 (1980).

[7] *See, e.g., Cameron v. Johnson,* 390 U.S. 611, 617, 88 S.Ct. 1335, 1338, 20 L.Ed.2d 182 (1968); *Cox v. Louisiana,* 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487 (1965).

[8] *See, e.g., Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 313, 88 S.Ct. 1601, 1605, 20 L.Ed.2d 603 (1968).

[9] These cases would be compatible with the analysis I have set forth, even if they were to be regarded as involving not "speech-plus" but purely nonspeech expressive conduct. The picketing cases, for example, do not invalidate

mine what particular conduct beyond the physical presence involved in the marching and picketing cases, or the distribution of literature involved in the littering case, is constitutionally deemed an essential concomitant of effective speech; but I consider it self-evident that on-site sleeping is not.)

It is only such cases as *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (flying of a red flag), *Brown v. Louisiana,* 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (silent sit-in), *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (burning of a draft card), *Tinker v. Des Moines School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (black arm-bands), and *Spence v. Washington,* 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (defacing the United States flag), that clearly present situations in which speech—that is, the spoken or written word—is not necessarily involved.[10] The holdings of all these cases support the analysis set forth above. Every proscription of expressive conduct struck down by the Supreme Court was aimed precisely at the communicative effect of the conduct. The only reason to ban the flying of a red flag (*Stromberg*) was the revolutionary sentiment that symbol expressed.[11] The only reason for applying the "breach of the peace" statute to the silent presence of black protestors in the library in *Brown* was the effect which the communicative content of that presence had upon onlookers.[12] The only reason for singling out black armbands for a dress proscription (*Tinker*) was precisely their expressive content, allegedly

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general prohibitions against walking back and forth, or against obstructing entrances, but rather banning such activities when engaged in for the (expressive) purpose of inducing people to refrain from trading or working. See, *e.g., Thornhill v. Alabama,* 310 U.S. 88, 91–92 [60 S.Ct. 736, 738–739, 84 L.Ed. 1093] (1940), where the statute forbade "[a]ny person . . . [to] go near to or loiter about the premises or place of business of any other person . . . for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons . . . ." *See also Carlson v. California,* 310 U.S. 106 [60 S.Ct. 746, 84 L.Ed. 1104] (1940). The marching cases typically turn upon the use of a vague ordinance for the very purpose of suppressing *only* expressive activity. *See, e.g., Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 153, 89 S.Ct. 935, 940, 22 L.Ed.2d 162 (1969); *Edwards v. South Carolina,* 372 U.S. 229, 236, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963).

[10] In my view, the nude entertainment holdings do not deal with mere expressive conduct. *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), struck down the challenged ordinance on overbreadth grounds, since it included all live entertainment—including spoken entertainment. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), involved a prohibition not of nudity alone, but of the entire stage production "Hair" because it included nudity. It stands for the well-established principle that a spoken or written work which has "serious artistic value" cannot be banned simply because it includes matter which, in isolation, might be proscribable. In *California v. LaRue,* 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972), the Court said that "at least some of the performances" covered by the regulation banning nudity and sexual acts "are within the limits of the constitutional protection of freedom of expression" (the case in any event upheld the regulation); and in *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975), it said that the nude barroom dancing might be protected "under some circumstances." Both these cases may have had in mind only nudity in connection with a spoken or sung performance. In any case, I find it difficult to believe that exhibitory nudity will, on the ground that it is independently "communicative," be accorded *greater* constitutional protection than the nondemonstrative sort, such as nude bathing, *see, e.g., Chapin v. Town of Southampton,* 457 F.Supp. 1170 (E.D.N.Y.1978). In other words, to the extent the nude entertainment cases speak to nudity apart from spoken or sung performances they seem to me based upon the "personal autonomy" rather than the "free speech" line of cases. *See* note 2, *supra.*

[11] The statute in *Stromberg* forbade the flying of "a red flag, banner or badge . . . as a sign, symbol or emblem of opposition to organized government . . . ." 283 U.S. at 361, 51 S.Ct. at 532.

[12] "The statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility." 383 U.S. at 142, 86 S.Ct. at 724.

causing classroom disruption.[13] The only reason to prevent the attachment of symbols to the United States flag (*Spence*) was related to the communicative content of the flag.[14] In *O'Brien,* on the other hand, where the Supreme Court upheld a ban on the destruction of draft cards, the law was not directed against the communicative nature of that activity.[15]

I do not suggest that the dicta of all the expressive conduct cases, as opposed to their holdings, support the distinction set forth above. Some of the opinions merely label the conduct "expressive" and proceed at once to application of First Amendment standards. Only *O'Brien,* however, really raises the question (though leaves it unanswered) [16] of what it is that avoids required application of those standards in every case. It is true that *O'Brien* appears to prescribe an inquiry, identical to that which I have described, as one of the four tests to be applied *after* it is determined that full First Amendment protections obtain. That would be inconsistent with my analysis if the *O'Brien* formulation were directed exclusively at "expressive conduct" cases—for a test triggered by the protection could hardly be the very test applied to determine whether the protection exists in the first place. In fact, however, the *O'Brien* discussion is directed at the tests to be applied in order to validate a statute impinging upon *any* activity protected by the First Amendment—not just expressive conduct, but also conduct "intertwined with speech," and indeed even religiously motivated or associational conduct.[17] For most of these categories the test would *not* be duplicative; it is only the governmental restriction of purely expressive conduct that escapes the necessity of First Amendment analysis if it is not aimed at repressing expression. This explanation is confirmed by the Supreme Court's later per curiam opinion in *Spence,* which, in the context of expressive conduct, describes the inquiry into expression-suppressing purpose—as I have—as a test *preliminary* to the application of *O'Brien's* four-step analysis.[18]

I find *O'Brien* supportive of my view since it shows the importance of statutory purpose in the Court's thinking. The distinction here proposed is described explicitly in the following passage:

> The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California,* 283 U.S. 359 [51 S.Ct. 532, 75 L.Ed. 1117] (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct.

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[13] "The school officials banned and sought to punish petitioners for a silent, passive expression of opinion unaccompanied by any disorder or disturbance on the part of petitioners." 393 U.S. at 508, 89 S.Ct. at 737.

[14] "If [Washington's interest in preserving the national flag as an unalloyed symbol of our country] is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States v. O'Brien* ... is inapplicable." 418 U.S. at 414 n. 8, 94 S.Ct. at 2732 n. 8 (citation omitted).

[15] "[B]oth the governmental interest and the operation of the 1965 Amendment [banning draft card burning] are limited to the noncommunicative aspect of O'Brien's conduct." 391 U.S. at 381–82, 88 S.Ct. at 1681–1682.

[16] "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity." 391 U.S. at 376, 88 S.Ct. at 1678.

[17] *See* the cases cited at 391 U.S. at 376–77 nn. 22–27, 88 S.Ct. at 1678–1679 nn. 22–27.

[18] *See* note 14, *supra.*

allowed; and the rule for demonstrators will inevitably (and perhaps rightly) tend to become the rule for the public at large—all with needlessly harmful effect upon the agreeability of our parks and public places. The unfortunate result is described by Justice Jackson's statement in *Saia v. New York, supra,* 334 U.S. at 566, 68 S.Ct. at 1152, which I take the liberty of adapting to the facts of this case: "I dissent from this decision, which seems to me to endanger the great right of free speech by making it ridiculous and obnoxious, more than the Park Service regulation in question menaces free speech by proscribing sleep."

UNITED STATES of America

v.

Milton Charles SMITH, aka "Creep," aka "Shaw," aka "Short," Appellant.

No. 81–2210.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 2, 1983.

Decided March 25, 1983.

Appeal was taken from a judgment of the United States District Court for the District of Columbia, June L. Green, J., denying defendant's motion to vacate conviction and sentence. The Court of Appeals held that: (1) District Court erroneously imposed sentences on both greater offense of engaging in continuing criminal enterprise and lesser included offense of conspiracy to distribute controlled substance, and (2) District Court's imposition of 15 to 30-year sentence violated statute requiring that minimum sentence not exceed one third of maximum imposed.

Remand for correction of sentencing; conviction and sentence vacated.

1. Criminal Law ⇐984(5)

District court erroneously imposed sentences on both greater offense of engaging in continuing criminal enterprise and lesser included offense of conspiracy to distribute controlled substance. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 408, 21 U.S.C.A. §§ 846, 848.

2. Criminal Law ⇐991(3)

District court's imposition of 15 to 30-year sentence following conviction for engaging in continuing criminal enterprise, conspiracy to distribute controlled substance, possession with intent to distribute controlled substance and traveling in interstate commerce with intent to distribute controlled substance violated statute requiring that minimum sentence not exceed one third of maximum imposed. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), 406, 408, 21 U.S.C.A. §§ 841(a), 846, 848; 18 U.S.C.A. § 4205(b)(1).

Appeal from the United States District Court for the District of Columbia (D.C. Criminal No. 77–00726).

George D. Baker, Washington, D.C. (appointed by this court), Washington, D.C., with whom John J. McMackin, Jr., Washington, D.C. (appointed by this court) was on the brief, for appellant.

Louis M. Fischer, Atty., Dept. of Justice, Washington, D.C., of the bar of the Supreme Court of the United States, pro hac vice, by special leave of court, with whom Stanley S. Harris, U.S. Atty., and Michael W. Farrell, Charles J. Harkins, Jr., and Daniel S. Seikaly, Asst. U.S. Attys., Washington, D.C., were on the brief, for appellees.

391 U.S. at 382, 88 S.Ct. at 1681. To the same effect is the following statement in *Buckley v. Valeo,* 424 U.S. 1, 17, 96 S.Ct. 612, 633, 46 L.Ed.2d 659 (1976):

> Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve "suppressing communication." The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. Unlike *O'Brien,* where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to conduct is itself thought to be harmful." 391 U.S. at 382, 88 S.Ct. at 1681.

The effect of the rule I think to be the law may be to permit the prohibition of some expressive conduct that might be desirable. Perhaps symbolic campsites[19] or symbolic fire bases[20] are a good idea. But it is not the function of the Constitution to make such fine judgments; nor is it within the practical power of the courts to apply them. There is a gap between what the Constitution requires and what perfect governance might sometimes suggest, in the area of expression as in other fields. So long as the Park Service is held to even-handed application of its rules, I doubt that the political pressures generated in a representative democracy will tolerate the proscription of all expressive conduct, in Lafayette Park or anywhere else. The Park Service's judgment will not be distorted, however—nor its time and ours consumed—in the mistaken pursuit of a supposed constitutional answer.

Where expressive conduct unrelated to speech is at issue, I think it worthwhile to engage in the preliminary step of analysis that separates conduct-prohibiting from expression-prohibiting laws and exempts the former from rigorous First Amendment scrutiny. The government argued in the present case, with some justification, that the posture in which it now finds itself—prohibiting sleep, but permitting all of the external manifestations of sleeping, including tents—is attributable to its efforts to comply with the directives of this court relating to the special justification needed to prohibit expressive conduct. *See Women Strike for Peace v. Morton,* 472 F.2d 1273 (D.C.Cir.1972). The Park Service has in effect been required to split each of its regulations into two: one that applies to people who are not engaging in the prohibited conduct for an expressive purpose, which can be enforced as written; the other that applies to demonstrators, which can be enforced only if supported by the substantial governmental interest that the First Amendment requires. That necessity may be unavoidable with regard to the relatively narrow range of conduct essential to effective speech. But to expand it to all conduct, even including sleep, seems to me unreasonable and unlikely to work. Park Service officers who have even less assurance of the proper application of the *O'Brien* four-part test than the various opinions of this court display will (against their sound administrative judgment) permit "symbolic" intrusions that need not be

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[19] *See Vietnam Veterans Against the War v. Morton,* 506 F.2d 53 (D.C.Cir.1974) (per curiam).

[20] *See* Reply to Appellees' Opposition to Appellants' Emergency Motion for Injunction Pending Appeal and Opposition to Appellants' Motion for Summary Affirmance at 46 (Dec. 14, 1982) (description of Vietnam Veterans' May 1982 demonstration).

Robert *Wilhelm* v. *Continental Title Co.*
(10th Cir. 1983)

§1985 after *United Brotherhood*: says "the Court made it clear that §1985(3) did not cover conspiracies motivated by economic, political or commercial animus."

10th Cir. finds "no encouragement" to extend "1985" to classes other than those involved in the *strife* in the South in 1871"...

Languirand v. Hayden
(5th Cir. 1983)

Cop shot kid - no municipal liability under *Monell* because no policy or custom. No "*affirmative link*" between misconduct & official direction.

U.S. v. *Weitz*, (DC. Cir. 1983)
Bork, MacKinnon*, Fairchild (visitor)
J. Bryant below

* Opinion: Abscam convictions

Δ says: Out of court statements of a co-conspirator were admissible against def. under 801(d)(2)(E) only if Ct. found substantial independent evidence of an *unlawful* combination. Court

of Resp. here says no – just common purpose, plan – lawful or unlawful – is enough – any joint venture. But there must be proof by independent evidence of a common enterprise.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,
v.
JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED
NOV 14 1978
JAMES F. DAVEY, Clerk

ORDER

Upon consideration of plaintiffs' motion for disclosure of documents included in federal defendants' *in camera* exhibit E, and it appearing to the Court that such documents have in fact been disclosed to plaintiffs, it is this 14th day of November, 1978

ORDERED, that plaintiffs' motion for disclosure of documents included in federal defendants' *in camera* exhibit E be, and hereby is, denied.

J. H. Pratt
John H. Pratt
United States District Judge

By order of the Clerk of Court dated December 7, 1977, a special process server was appointed to serve the amended complaint upon the recently added defendants. The special process server attempted to serve the amended complaint by delivering a copy of the complaint and summonses to Cecil Wilson, allegedly an agent for receipt of service of process for the individuals listed in the interrogatory. On the representation of counsel for the federal defendants that Cecil Wilson was not authorized to accept service for these persons, the complaint and summonses were retrieved from the Washington, D.C. Field Office of the Federal Bureau of Investigation by plaintiffs' special process server. As of this date, plaintiffs' special process server has yet to serve these 28 individuals, two of whom have since deceased.

We concur with plaintiffs' contention and supporting authority that the names and addresses of individuals potentially having knowledge of events related to a cause of action is within the realm of discoverable matter. See Federal Rules of Civil Procedure, Rule 26(b)(1). See also McKeon v. Highway Truckdrivers and Helpers, Local 107, 28 F.R.D. 592 (D.Del. 1961); Edgar v. Finley, 3]2 F. 2d 533 (8th Cir. 1963) ; Ballard v. Terrak, 58 F.R.D. 184 (E.D. Wis. 1972). In the context of this action, however, plaintiffs' interrogatory seeks more than the release of discoverable information. This interrogatory is tantamount to a request that the federal defendants who have already been served in this action effectively assist in the service of process upon co-defendants by identifying their whereabouts. Without deciding at this time whether release of the addresses of the co-defendants would amount to an infringement of their privacy, we are persuaded that plaintiffs have not yet fulfilled their primary responsibility to undertake diligent efforts to effect service of process upon named defendants. Planitiffs should not through the use of discovery devices be relieved of that responsibility. See, e.g., United States v. Wohl, 406 F. Supp. 1396,]400 (E.D. Mich. 1976); Newart v. George F. Hellick Coffee Co., 325 F. Supp.1047, 1048 (E.D. Pa. 1971). Absent a showing that

plaintiffs have made a diligent effort to effect service of process upon defendants identified in the interrogatory, this Court will not now require the federal defendants to answer the interrogatory.

Accordingly, it is this 14th day of November, 1978

ORDERED, that plaintiffs' motion for an order compelling a response by the federal defendants to plaintiffs' second set of interrogatories to the federal defendants be, and hereby is, denied.

J. H. Pratt

John H. Pratt
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 76-1326
)
JERRY WILSON, et al.,)
)
Defendants.)

FILED

NOV 14 1978

JAMES F. DAVEY, Clerk

MEMORANDUM ORDER

Plaintiffs in this action seek a motion to compel the federal defendants to answer interrogatory number 1 of plaintiffs' second set of interrogatories to the federal defendants filed May 22, 1978. This interrogatory asks the defendants to supply the "current residential address for, or in the alternative, the name and location of an individual authorized to receive service of process for" [28 individuals who are allegedly employed in the Washington Field Office of the Federal Bureau of Investigation]. The federal defendants have opposed the motion on the ground that an answer to this interrogatory would be tantamount to their assistance in the service of the summons and complaint and would infringe upon the privacy of those individuals listed in the interrogatory.

The 28 listed individuals first appeared in the record of the action in a December 8, 1976 response by defendants Kelly and Stames, in their official capacities, to plaintiffs' first set of interrogatories to defendants Kelly, Sullivan, Kunkel, McDermott and Stames. These persons were identified as having supervisory responsibilities over conduct which forms the subject matter of this action. On October 5, 1977, plaintiffs moved for leave to file an amended complaint which _inter alia_ added these individuals as defendants. On October 27, 1977, this Court granted plaintiffs' motion and the amended complaint was filed on the following day, October 28, 1978.

5. I believe this collection of materials is sufficient to demonstrate to the Attorney General and to this Court the manner and circumstances in which information which could reasonably be expected to reveal the identities of confidential informants was removed from documents prior to production to plaintiffs.

I believe these documents are representative of all the information withheld pursuant to the informant privilege; accordingly, I believe they constitute an appropriate "representative sample" as requested by this Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On:

December 15, 1977

David H. White
DAVID H. WHITE
Attorney, Department of Justice

3. Following this Court's denial on October 26, 1977, of the motion to reconsider the requirement that the informant privilege be claimed by the Attorney General, a "representative sample" of information withheld on the basis of the privilege was compiled for the consideration of the Attorney General and for presentation to this Court for its in camera, ex parte examination. With the assistance of a Special Agent of the Federal Bureau of Investigation's Office of Legal Counsel, who was closely involved in the review and preparation of the files for production, I personally reviewed the files to select those items which would constitute the materials to be considered by the Attorney General. Having also been involved in a supervisory way in the preparation of the documents for production, I was generally familiar with the various kinds of circumstances in which information had been excised in order to protect the identities of informants.

4. In undertaking the selection process, we concluded that it would be impracticable to take a sample of information pertaining to each informant in the files, as that would have resulted in an unmanageably large body of materials. We elected instead to select from each of the files examples which reflected the various kinds of situations in which information has been expunged in order to protect informant identities. The representative sample thus includes documents which were (a) produced in their entirety except for deletion of the informant's name or the Federal Bureau of Investigation's abstract informant symbol, (b) produced with discrete items of information removed but with a substantial portion of the text left intact, and (c) withheld entirely where it appeared that removal of selected items of information would not have sufficiently protected against disclosure of an informant's identity.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs, v. JERRY WILSON, et al., Defendants.	CIVIL ACTION NO. 76-1326

DECLARATION

City of Washington)
) ss
District of Columbia)

DAVID H. WHITE declares the following to be true and correct:

1. I am a Trial Attorney with the United States Department of Justice, Washington, D.C., and the attorney of record for the present and former employees and officials of the United States Government who are defendants in this civil action.

2. By Order of April 19, 1977, this Court directed the Federal Bureau of Investigation to produce for plaintiffs' inspection the files pertaining to the internal security investigations of plaintiff. The Court later stated, in an Order dated June 24, 1977, and in open court on June 28, 1977, that if the Federal Bureau of Investigation desired to withhold any information on grounds that its release would disclose the identity of a confidential informant, the withholding must be supported by a formal claim of privilege executed by the Attorney General. The Court explained that the Attorney General could accomplish the claim of privilege by consideration of a "representative sample" rather than all of the information protected by the privilege.

6. Having personally considered the information made available to me and being cognizant of the governmental interest in protecting the identities of persons who assist in the enforcement of the laws by providing information to the government on a confidential basis, I herewith formally claim privilege as to that information contained in the files being produced by the Federal Bureau of Investigation which could reasonably be expected to reveal the identities of confidential informants.

Griffin B. Bell

GRIFFIN B. BELL
Attorney General of the
United States

Sworn to and subscribed before me this 15th day of December, 1977.

Williams
Notary Public

My commission expires March 14, 1979.

5. The expunctions made in the documents contained in *in camera* exhibit E are consistent with the principles stated in paragraph 4 of this affidavit. The informant's name and address are removed wherever a document indicates that that person has provided information on a confidential basis. Also excised are the abstract symbols used by the Federal Bureau of Investigation in recording and transmitting information provided by informants. Where the text of the communication could reasonably be expected to disclose an informant's identity, it is excised either selectively or, if necessary, in its entirety. An entire document is withheld if (a) all the information appears to have been available only to the informant, such as where the report concerns a personal contact or conversation between the informant and the subject, or (b) the information was available to a small identifiable group of persons so that there is a significant risk the informant could be isolated and identified. The latter situation occurs, for example, where the informant is present at and reports on a series of gatherings or events and it would be possible to identify the only person, or the few persons, present on each such occasion. In addition, all informants' handwriting has been expunged since that could lead to disclosure of his or her identity. Selective excision is made where it is possible to isolate and remove discrete items, such as name, dates, places, or other information that would tend to identify the informant, but the text otherwise remains intact. Where it reasonably appears that nothing in the report could identify the informant, such as a report of a large public meeting, no excisions are made. *In camera* exhibit E contains examples of each manner of excision and demonstrates the various sorts of circumstances in which information has been withheld from plaintiffs in order to prevent disclosure of the identities of confidential informants.

sample of the information withheld and that I am not required, therefore, to review personally each excision of information from the documents to be produced to plaintiffs.

3. (a) The Federal Bureau of Investigation, through the Assistant Attorney General, Civil Division, has made available to me a quantity of documents from plaintiffs' files which I am advised constitutes a "representative sample" of the information withheld from plaintiffs in order to prevent the disclosure of the identities of confidential informants. Mr. David H. White, an attorney in the Department of Justice's Civil Division, affirms in his written declaration that these documents are representative of all the information withheld pursuant to the informant privilege [See Declaration of David H. White, attached as Exhibit I to this affidavit]. On the basis of this declaration and assurances to the same effect by the Federal Bureau of Investigation, I believe these documents are sufficiently representative to permit me to give full consideration to, and for the court to uphold, this formal claim of privilege.

(b) The documents constituting the "representative sample" are contained in in camera exhibit E. Red markings on the documents indicate those portions which were expunged in order to prevent disclosure of the identifies of confidential informants.

4. My understanding of the law applicable to these matters is that the government is entitled to assert privilege against the disclosure of the identity of persons who provide information to assist the government in its law enforcement endeavors. By removing the fear of reprisal, the privilege encourages citizens to cooperate in the administration of justice and thus serves the interest of the public in protecting the flow of information. Although only the identity of the informant is privileged, the informant's communication is privileged to the extent that its disclosure would [illegible] [illegible] the informant's identity.

UNITED STATES DISTRICT COURT
FOR THE
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JULIUS HOBSON, et al.,
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CIVIL ACTION NO. 76-1326

AFFIDAVIT AND CLAIM OF PRIVILEGE

City of Washington)
) ss
District of Columbia)

GRIFFIN B. BELL, being duly sworn, deposes and says as follows:

1. I am the Attorney General of the United States and head of the United States Department of Justice, an Executive Department of the United States Government. I have official custody and control of the files and records of the United States Department of Justice. The matters herein are based upon my knowledge and upon review and consideration of information available to me in my official capacity.

2. I am aware that the plaintiffs in this action have demanded, and this Court has ordered, the production of Federal Bureau of Investigation files relating to the internal security investigations of plaintiffs. I am also aware that this Court has directed that the head of the agency involved, in this instance the Department of Justice, must claim the privilege as to information in the files which could reasonably be expected to reveal the identities of confidential informants. I have been advised, however, that this Court will permit the privilege to be considered and claimed by me through a representative

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs, v. JERRY WILSON, et al., Defendants.	CIVIL ACTION NO. 76-1326

NOTICE OF FILING CLAIM OF INFORMANT PRIVILEGE AND SUBMISSION OF IN CAMERA EXHIBIT

Please take notice that defendant Clarence M. Kelley, pursuant to this Court's Orders of June 24, 1977, and October 26, 1977, has filed the attached Affidavit and Claim of Privilege by Attorney General Griffin B. Bell regarding that information which could reasonably be expected to disclose the identity of confidential informants. This Affidavit is accompanied by an *in camera* exhibit, identified as Exhibit E, and the Declaration of David H. White, identified as Exhibit I.

DATED: December 15, 1977

Respectfully submitted,

Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

David J. Anderson
DAVID J. ANDERSON

David H. White
DAVID H. WHITE

Attorneys, Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-4269

Attorneys for Defendant
Clarence M. Kelley

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JULIUS HOBSON, et al.,

Plaintiffs-Appellees,

v.

JERRY WILSON, et al.,

Defendants-Appellants.

Nos. 82-2159
82-2160
82-2221
82-2226
82-2227

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 1983, I served the foregoing BRIEF OF APPELLANTS CHARLES D. BRENNAN, GEORGE C. MOORE, GEROULD W. PANGBURN, AND GERALD T. GRIMALDI by mailing copies, postage prepaid, to counsel for the other parties:

Anne Pillsbury
17 Danforth Street
Norway, Maine 04268

Herb Semmel
Antioch School of Law for
the Urban Law Institute
1624 Crescent Place, N.W.
Washington, D.C. 20009

Morton Stavis
Randolph Scott-McLaughlin
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Mary Boresz Pike
Somerstein & Pike
233 Broadway
Suite 670
New York, New York 10279

Richard B. Nettler
District Building
14th & E Streets, N.W.
Washington, D.C. 20004

Roy Randolph
Sharp, Randolph & Green
Suite 501
1800 Massachusetts Ave.
Washington, D.C. 20036

DAVID H. WHITE

CCR Center for Constitutional Rights

853 Broadway • 14th floor • New York, New York 10003 • [212] 674-3303

October 4, 1983

Marc Johnston, Esq.
Civil Division
Room 3627
Dept. of Justice
Washington, D.C. 20530

Dear Marc:

I am sending you by Federal Express our only set of Plaintiffs' Exhibits. Included herewith are: Pl. exhs. 1-31A, 36, 45-68, 69, 70, 71, 72, 80, 83, 105 and portions of 95-103 (plaintiffs' FBI files).

These exhibits have all been designated by someone to go in the appendix. Based on our conversation this morning, I assume you will list these documents seriatim as Plaintiffs' Exhibits.

Good luck.

Very truly yours,

Anne Pilsbury

Anne Pilsbury

Government of the District of Columbia
OFFICE OF THE CORPORATION COUNSEL
DISTRICT BUILDING
WASHINGTON, D. C. 20004

IN REPLY REFER TO:
A: RBN: sj

September 7, 1983

Anne Pilsbury, Esq.
17 Danforth Street
Norway, Maine 04268

Marc Johnston, Esq.
Appellate Staff - Civil Division
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Ms. Pilsbury and Mr. Johnston:

The following are my requests for inclusion in the deferred joint appendix:

1. Docket entries

2. Opinions and orders - R. 6, R. 78B, R. 87C, R. 105 & 106, R. 184, R. 213, R. 254 & 255.

3. Pleadings - R. 1, 3, 17, 56, 74, 82, 99, 100, 101, 104, 105, 106, 107, 111m, 112, 171, 172, 173, 178, 184, 195, 200, 200A, 200B, 211, 213, 215, 228, 229, 230,231, 232,233, 233C, 234, 235, 243, 250, 252, 255, 255E, 255G, 261E, 261G, 280E.

4. Deposition pages - R.87A at 31, 44, 48, 58-59; R.87B at 17-21, 13-15; R.88C at 9-10, 41-46; R.88B at 13-15, 40, 43, 91, 95-96; R.88D at 13-14, 26-28, 33, 47-48; R.88E 5, 11, 16, 25, 28, 37; R.89B at 6, 10, 28-31, 39.

5. Trial transcript and exhibits -

R. 257 - 132; R. 260 at 37-40,69-70,76,86-97,106-108, 113-116,120-121,151,154-159,160,168-175,188,197-204; R. 261 at 259-263,298-306,343-354,361,365,372-374,391-393, 422; R. 262 at 1-2, 98-102; R. 263 at 15-21,62,69,99,118-127, 131-138, 145,149,154-158, 163,167-170,176-180,195, 205-207,219; R. 264 at 241-244,261-262,264-271,279,286-288, 292-303,309-312,318,319-320,323,333-339,346-349,355-357, 363-369,376,413-415,430-436; R. 265 at 506-507,520,532-534, 539-541,579,637-653,485-486; R. 266 at 691,750,764-766; R. 267 at 819,838; R. 268 at 858-859,870,881-897,916-918,

5. Trial transcript and exhinits (cont.) -

R. 268(cont.) at 923-926,939-942,945-946,949-957,964-967, 985-986,997,1000-1004,1016-1037,1043-1044; R. 269 at 10-26,42-45,48-49,54-75,81-88,92-96,100-104,114,119,138, 142,146-148,154-155,162-170; R. 270 at 335,348,358-364; R. 271 at 584-590; R. 272 at 3,11-22,32-36,44-50,71,75-78,88-91,95-111,117-123; R. 273 at 149,169; R. 275 at 247,250-251,256-257,261-265,286-287,294-296; R. 276 at 300-315; R. 280 at 76-77,102-103; R. 287 Exhibits 1-4; R. 288 Exhibits 18-20; Plaintiffs' Exhibit 72.

I hope that preparation of the appendix can be completed on
me. This can be facilitated by appellees compiling a list of the
ages in the trial transcript they wish to have included in the ap-
endix.

Sincerely,

Richard B. Nettler

Richard B. Nettler

cc. A. Raymond Randolph

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,
v.
JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED
NOV 14 1978
JAMES F. DAVEY, Clerk

MEMORANDUM ORDER

Plaintiffs in this action seek a motion to compel the federal defendants to answer interrogatory number 1 of plaintiffs' second set of interrogatories to the federal defendants filed May 22, 1978. This interrogatory asks the defendants to supply the "current residential address for, or in the alternative, the name and location of an individual authorized to receive service of process for" [28 individuals who are allegedly employed in the Washington Field Office of the Federal Bureau of Investigation]. The federal defendants have opposed the motion on the ground that an answer to this interrogatory would be tantamount to their assistance in the service of the summons and complaint and would infringe upon the privacy of those individuals listed in the interrogatory.

The 28 listed individuals first appeared in the record of the action in a December 8, 1976 response by defendants Kelly and Stames, in their official capacities, to plaintiffs' first set of interrogatories to defendants Kelly, Sullivan, Kunkel, McDermott and Stames. These persons were identified as having supervisory responsibilities over conduct which forms the subject matter of this action. On October 5, 1977, plaintiffs moved for leave to file an amended complaint which inter alia added these individuals as defendants. On October 27, 1977, this Court granted plaintiffs' motion and the amended complaint was filed on the following day, October 28, 1978.

By order of the Clerk of Court dated December 7, 1977, a special process server was appointed to serve the amended complaint upon the recently added defendants. The special process server attempted to serve the amended complaint by delivering a copy of the complaint and summonses to Cecil Wilson, allegedly an agent for receipt of service of process for the individuals listed in the interrogatory. On the representation of counsel for the federal defendants that Cecil Wilson was not authorized to accept service for these persons, the complaint and summonses were retrieved from the Washington, D.C. Field Office of the Federal Bureau of Investigation by plaintiffs' special process server. As of this date, plaintiffs' special process server has yet to serve these 28 individuals, two of whom have since deceased.

We concur with plaintiffs' contention and supporting authority that the names and addresses of individuals potentially having knowledge of events related to a cause of action is within the realm of discoverable matter. See Federal Rules of Civil Procedure, Rule 26(b)(1). See also McKeon v. Highway Truckdrivers and Helpers, Local 107, 28 F.R.D. 592 (D.Del. 1961); Edgar v. Finley, 3]2 F. 2d 533 (8th Cir. 1963) ; Ballard v. Terrak, 58 F.R.D. 184 (E.D. Wis. 1972). In the context of this action, however, plaintiffs' interrogatory seeks more than the release of discoverable information. This interrogatory is tantamount to a request that the federal defendants who have already been served in this action effectively assist in the service of process upon co-defendants by identifying their whereabouts. Without deciding at this time whether release of the addresses of the co-defendants would amount to an infringement of their privacy, we are persuaded that plaintiffs have not yet fulfilled their primary responsibility to undertake diligent efforts to effect service of process upon named defendants. Planitiffs should not through the use of discovery devices be relieved of that responsibility. See, e.g., United States v. Wohl, 406 F. Supp. 1396,]400 (E.D. Mich. 1976); Newart v. George F. Hellick Coffee Co., 325 F. Supp.1047, 1048 (E.D. Pa. 1971). Absent a showing that

plaintiffs have made a diligent effort to effect service of process upon defendants identified in the interrogatory, this Court will not now require the federal defendants to answer the interrogatory.

Accordingly, it is this 14th day of November, 1978

ORDERED, that plaintiffs' motion for an order compelling a response by the federal defendants to plaintiffs' second set of interrogatories to the federal defendants be, and hereby is, denied.

J. H. Pratt
John H. Pratt
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,
v.
JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED
NOV 14 1978
JAMES F. DAVEY, Clerk

ORDER

Upon consideration of plaintiffs' motion for disclosure of documents included in federal defendants' *in camera* exhibit E, and it appearing to the Court that such documents have in fact been disclosed to plaintiffs, it is this 14th day of November, 1978

ORDERED, that plaintiffs' motion for disclosure of documents included in federal defendants' *in camera* exhibit E be, and hereby is, denied.

J. H. Pratt
John H. Pratt
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY WILSON, et al.,

Defendants.

CIVIL ACTION NO. 76-1326

NOTICE OF FILING CLAIM OF INFORMANT PRIVILEGE AND SUBMISSION OF IN CAMERA EXHIBIT

Please take notice that defendant Clarence M. Kelley, pursuant to this Court's Orders of June 24, 1977, and October 26, 1977, has filed the attached Affidavit and Claim of Privilege by Attorney General Griffin B. Bell regarding that information which could reasonably be expected to disclose the identity of confidential informants. This Affidavit is accompanied by an *in camera* exhibit, identified as Exhibit E, and the Declaration of David H. White, identified as Exhibit I.

DATED: December 15, 1977

Respectfully submitted,

Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

David J. Anderson
DAVID J. ANDERSON

David H. White
DAVID H. WHITE

Attorneys, Department of Justice
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Telephone: (202)739-4269

Attorneys for defendant
Clarence M. Kelley

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 76-1326
JERRY WILSON, et al.,	)	
Defendants.	)	

AFFIDAVIT AND CLAIM OF PRIVILEGE

City of Washington)
) ss
District of Columbia)

GRIFFIN B. BELL, being duly sworn, deposes and says as follows:

1. I am the Attorney General of the United States and head of the United States Department of Justice, an Executive Department of the United States Government. I have official custody and control of the files and records of the United States Department of Justice. The matters herein are based upon my knowledge and upon review and consideration of information available to me in my official capacity.

2. I am aware that the plaintiffs in this action have demanded, and this Court has ordered, the production of Federal Bureau of Investigation files relating to the internal security investigations of plaintiffs. I am also aware that this Court has directed that the head of the agency involved, in this instance the Department of Justice, must claim the privilege as to information in the files which could reasonably be expected to reveal the identities of confidential informants. I have been advised, however, that this Court will permit the privilege to be considered and claimed by me through a representative

sample of the information withheld and that I am not required, therefore, to review personally each excision of information from the documents to be produced to plaintiffs.

3. (a) The Federal Bureau of Investigation, through the Assistant Attorney General, Civil Division, has made available to me a quantity of documents from plaintiffs' files which I am advised constitutes a "representative sample" of the information withheld from plaintiffs in order to prevent the disclosure of the identities of confidential informants. Mr. David H. White, an attorney in the Department of Justice's Civil Division, affirms in his written declaration that these documents are representative of all the information withheld pursuant to the informant privilege [See Declaration of David H. White, attached as Exhibit I to this affidavit]. On the basis of this declaration and assurances to the same effect by the Federal Bureau of Investigation, I believe these documents are sufficiently representative to permit me to give full consideration to, and for the court to uphold, this formal claim of privilege.

(b) The documents constituting the "representative sample" are contained in *in camera* exhibit E. Red markings on the documents indicate those portions which were expunged in order to prevent disclosure of the identifies of confidential informants.

4. My understanding of the law applicable to these matters is that the government is entitled to assert privilege against the disclosure of the identity of persons who provide information to assist the government in its law enforcement endeavors. By removing the fear of reprisal, the privilege encourages citizens to cooperate in the administration of justice and thus serves the interest of the public in protecting the flow of information. Although only the identity of the informant is privileged, the informant's communication is privileged to the extent that its disclosure would operate also to disclose the informant's identity.

5. The expunctions made in the documents contained in *in camera* exhibit E are consistent with the principles stated in paragraph 4 of this affidavit. The informant's name and address are removed wherever a document indicates that that person has provided information on a confidential basis. Also excised are the abstract symbols used by the Federal Bureau of Investigation in recording and transmitting information provided by informants. Where the text of the communication could reasonably be expected to disclose an informant's identity, it is excised either selectively or, if necessary, in its entirety. An entire document is withheld if (a) all the information appears to have been available only to the informant, such as where the report concerns a personal contact or conversation between the informant and the subject, or (b) the information was available to a small identifiable group of persons so that there is a significant risk the informant could be isolated and identified. The latter situation occurs, for example, where the informant is present at and reports on a series of gatherings or events and it would be possible to identify the only person, or the few persons, present on each such occasion. In addition, all informant handwriting has been expunged since that could lead to disclosure of his or her identity. Selective excision is made where it is possible to isolate and remove discrete items, such as name, dates, places, or other information that would tend to identify the informant, but the text otherwise remains intact. Where it reasonably appears that nothing in the report could identify the informant, such as a report of a large public meeting, no excisions are made. *In camera* exhibit E contains examples of each manner of excision and demonstrates the various sorts of circumstances in which information has been withheld from plaintiffs in order to prevent disclosure of the identities of confidential informants.

6. Having personally considered the information made available to me and being cognizant of the governmental interest in protecting the identities of persons who assist in the enforcement of the laws by providing information to the government on a confidential basis, I herewith formally claim privilege as to that information contained in the files being produced by the Federal Bureau of Investigation which could reasonably be expected to reveal the identities of confidential informants.

Griffin B. Bell
GRIFFIN B. BELL
Attorney General of the
United States

Sworn to and subscribed before me this 15th day of December, 1977.

Audrey O. Williams
Notary Public

My commission expires March 14, 1979.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 76-1326
JERRY WILSON, et al., Defendants.	)	

DECLARATION

City of Washington)
) ss
District of Columbia)

DAVID H. WHITE declares the following to be true and correct:

1. I am a Trial Attorney with the United States Department of Justice, Washington, D.C., and the attorney of record for the present and former employees and officials of the United States Government who are defendants in this civil action.

2. By Order of April 19, 1977, this Court directed the Federal Bureau of Investigation to produce for plaintiffs' inspection the files pertaining to the internal security investigations of plaintiff. The Court later stated, in an Order dated June 24, 1977, and in open court on June 28, 1977, that if the Federal Bureau of Investigation desired to withhold any information on grounds that its release would disclose the identity of a confidential informant, the withholding must be supported by a formal claim of privilege executed by the Attorney General. The Court explained that the Attorney General could accomplish the claim of privilege by consideration of a "representative sample" rather than all of the information protected by the privilege.

EXHIBIT I

3. Following this Court's denial on October 26, 1977, of the motion to reconsider the requirement that the informant privilege be claimed by the Attorney General, a "representative sample" of information withheld on the basis of the privilege was compiled for the consideration of the Attorney General and for presentation to this Court for its in camera, ex parte examination. With the assistance of a Special Agent of the Federal Bureau of Investigation's Office of Legal Counsel, who was closely involved in the review and preparation of the files for production, I personally reviewed the files to select those items which would constitute the materials to be considered by the Attorney General. Having also been involved in a supervisory way in the preparation of the documents for production, I was generally familiar with the various kinds of circumstances in which information had been excised in order to protect the identities of informants.

4. In undertaking the selection process, we concluded that it would be impracticable to take a sample of information pertaining to each informant in the files, as that would have resulted in an unmanageably large body of materials. We elected instead to select from each of the files examples which reflected the various kinds of situations in which information has been expunged in order to protect informant identities. The representative sample thus includes documents which were (a) produced in their entirety except for deletion of the informant's name or the Federal Bureau of Investigation's abstract informant symbol, (b) produced with discrete items of information removed but with a substantial portion of the text left intact, and (c) withheld entirely where it appeared that removal of selected items of information would not have sufficiently protected against disclosure of an informant's identity.

5. I believe this collection of materials is sufficient to demonstrate to the Attorney General and to this Court the manner and circumstances in which information which could reasonably be expected to reveal the identities of confidential informants was removed from documents prior to production to plaintiffs.

I believe these documents are representative of all the information withheld pursuant to the informant privilege; accordingly, I believe they constitute an appropriate "representative sample" as requested by this Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On:

December 15, 1977

David H. White
DAVID H. WHITE
Attorney, Department of Justice

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,
v.
JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED
NOV 14 1978
JAMES F. DAVEY, Clerk

MEMORANDUM ORDER

Plaintiffs in this action seek a motion to compel the federal defendants to answer interrogatory number 1 of plaintiffs' second set of interrogatories to the federal defendants filed May 22, 1978. This interrogatory asks the defendants to supply the "current residential address for, or in the alternative, the name and location of an individual authorized to receive service of process for" [28 individuals who are allegedly employed in the Washington Field Office of the Federal Bureau of Investigation]. The federal defendants have opposed the motion on the ground that an answer to this interrogatory would be tantamount to their assistance in the service of the summons and complaint and would infringe upon the privacy of those individuals listed in the interrogatory.

The 28 listed individuals first appeared in the record of the action in a December 8, 1976 response by defendants Kelly and Stames, in their official capacities, to plaintiffs' first set of interrogatories to defendants Kelly, Sullivan, Kunkel, McDermott and Stames. These persons were identified as having supervisory responsibilities over conduct which forms the subject matter of this action. On October 5, 1977, plaintiffs moved for leave to file an amended complaint which *inter alia* added these individuals as defendants. On October 27, 1977, this Court granted plaintiffs' motion and the amended complaint was filed on the following day, October 28, 1978.

By order of the Clerk of Court dated December 7, 1977, a special process server was appointed to serve the amended complaint upon the recently added defendants. The special process server attempted to serve the amended complaint by delivering a copy of the complaint and summonses to Cecil Wilson, allegedly an agent for receipt of service of process for the individuals listed in the interrogatory. On the representation of counsel for the federal defendants that Cecil Wilson was not authorized to accept service for these persons, the complaint and summonses were retrieved from the Washington, D.C. Field Office of the Federal Bureau of Investigation by plaintiffs' special process server. As of this date, plaintiffs' special process server has yet to serve these 28 individuals, two of whom have since deceased.

We concur with plaintiffs' contention and supporting authority that the names and addresses of individuals potentially having knowledge of events related to a cause of action is within the realm of discoverable matter. See Federal Rules of Civil Procedure, Rule 26(b)(1). See also McKeon v. Highway Truckdrivers and Helpers, Local 107, 28 F.R.D. 592 (D.Del. 1961); Edgar v. Finley, 3]2 F. 2d 533 (8th Cir. 1963) ; Ballard v. Terrak, 58 F.R.D. 184 (E.D. Wis. 1972). In the context of this action, however, plaintiffs' interrogatory seeks more than the release of discoverable information. This interrogatory is tantamount to a request that the federal defendants who have already been served in this action effectively assist in the service of process upon co-defendants by identifying their whereabouts. Without deciding at this time whether release of the addresses of the co-defendants would amount to an infringement of their privacy, we are persuaded that plaintiffs have not yet fulfilled their primary responsibility to undertake diligent efforts to effect service of process upon named defendants. Planitiffs should not through the use of discovery devices be relieved of that responsibility. See, e.g., United States v. Wohl, 406 F. Supp. 1396,]400 (E.D. Mich. 1976); Newart v. George F. Hellick Coffee Co., 325 F. Supp.1047, 1048 (E.D. Pa. 1971). Absent a showing that

plaintiffs have made a diligent effort to effect service of process upon defendants identified in the interrogatory, this Court will not now require the federal defendants to answer the interrogatory.

Accordingly, it is this 14th day of November, 1978

ORDERED, that plaintiffs' motion for an order compelling a response by the federal defendants to plaintiffs' second set of interrogatories to the federal defendants be, and hereby is, denied.

J. H. Pratt
John H. Pratt
United States District Judge

Hobson, Vol. 2 (Jan. 77 - Sep. 77)

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,
v.
JERRY WILSON, et al.,
Defendants.

CIVIL ACTION NO. 76-1326

AFFIDAVIT AND CLAIM OF PRIVILEGE

City of Washington)
) ss
District of Columbia)

GRIFFIN B. BELL declares the following to be true and correct:

1. I am the Attorney General of the United States and head of the United States Department of Justice, an Executive Department of the United States Government. I have official custody and control of the files and records of the United States Department of Justice. The matters herein are based upon my knowledge and upon personal review and consideration of information available to me in my official capacity.

2. I am aware that the plaintiffs in this action have demanded, and this Court has ordered, the production of the Federal Bureau of Investigation files relating to the internal security investigations of plaintiffs. The Federal Bureau of Investigation, through the Assistant Attorney General, Civil Division, has made available to me documents from plaintiffs files which contain or which reveal information as to which the Bureau has requested I enter a formal claim of privilege. In addition, I have been provided with three affidavits of Mr. Thomas W. Leavitt, Assistant Director-

Intelligence Division, Federal Bureau of Investigation, regarding this information, and I have been orally briefed by Bureau personnel to assist me in my consideration of these matters.

3. Having personally considered the information made available to me, I herewith formally claim privilege as to the information described in this affidavit and in _in camera_ exhibits A, B, C, and D. My conclusions regarding this claim of privilege are set out below.

4. Exhibit A

(a) Information contained in the files of four of the plaintiffs relates to a current and continuing investigation involving the national security of the United States. As part of my duties as Attorney General, I am responsible for the supervision of the Federal Bureau of Investigation, and I have personally authorized the investigation referred to and it is subject to my continuing personal supervision. The named plaintiffs are not targets of this investigation.

(b) If the information relating to this investigation should be disclosed, the public interest and the national security of the United States would be prejudiced. Accordingly, as Attorney General of the United States, I formally claim privilege as to the information involved in the above-described investigation contained in the investigative files of the named plaintiffs herein.

(c) A classified affidavit, identified as Exhibit A, which more fully describes this investigation, is being submitted for the Court's _in camera_ examination.

5. Exhibit B

(a) The files pertaining to plaintiffs Julius Hobson, Richard Pollock, Abraham Bloom, Sammie Abbott, Arthur Waskow, and Women's Strike for Peace contain information derived from or which disclose the existence of electronic surveillance conducted by the Federal Bureau of Investigation. None of the plaintiffs was the target of electronic surveillance about which privilege is claimed; however, the files disclose overhearings of plaintiffs Pollock, Waskow, Bloom, Abbott, and individuals believed to be associated with the Women's Strike for Peace that occurred during the course of such electronic surveillances. In addition, the files identified above contain references to intercepted conversations in which plaintiffs were mentioned or which involved a person associated with a plaintiff or with an organization in which a plaintiff was interested.

(b) The electronic surveillances subject to this claim of privilege were authorized by the Attorney General in the exercise of the President's authority relating to the nation's foreign relations as described in 18 U.S.C. §2511(3), and were deemed necessary to protect the United States against actual or potential attack or other hostile acts of foreign powers, to obtain foreign intelligence information deemed essential to the security of the United States and/or to protect national security information against foreign intelligence activities.

(c) These electronic surveillances were conducted in connection with foreign intelligence investigations (1) to gather on a long-range basis, national security information to meet a potential threat to the nation's security from activities within the United States and abroad of certain foreign powers, (2) to gather, on a long-range basis, national security information to meet a potential threat to the nation's security from activities within the United States of individuals and organizations acting as agents of, or in collaboration with, certain foreign powers, and (3) to assist investigations in the area of espionage. The subjects and purposes of these electronic surveillances are more fully described in the affidavit of Mr. Thomas W. Leavitt, which is being submitted as Exhibit B for the Court's in camera examination. Some of the electronic surveillances are continuing.

(d) To disclose the subject, purpose, and other details of these electronic surveillances would identify a sensitively placed confidential Federal Bureau of Investigation informant who is still operating and furnishing information of the highest value, would reveal current foreign intelligence investigations, would prejudice the public interest and the national security of the United States, would have a prejudicial impact on the conduct of our foreign affairs and on the relations of the United States with the foreign powers which are the subjects of these investigations. Accordingly, as Attorney General of the United States, I formally claim privilege as to the information relating to the electronic surveillances, conducted for foreign intelligence gathering purposes, which is contained in the investigative files of the named plaintiffs herein.

6. Exhibit C

(a) The files pertaining to plaintiffs Arthur Waskow and Women's Strike for Peace contain information derived from or which would reveal the existence of mail covers conducted by the United States Post Office and the United States Postal

Service at the request of the Federal Bureau of Investigation. They were conducted in connection with foreign counterintelligence investigations being carried out by the Bureau. The information in plaintiffs' files was obtained through mail covers which, pursuant to established procedures, were requested by the Director of the Federal Bureau of Investigation. Under current criteria and procedures, requests for such mail covers are approved by the Attorney General.

(b) The mail cover procedure involves the copying of the names and addresses from the exterior of correspondence mailed to the targets of the mail cover. Mail is not opened or delayed in its delivery.

(c) The disclosure of the subjects and purposes of these mail covers would reveal, and thus prejudice, current and continuing foreign counterintelligence investigations being conducted by the Federal Bureau of Investigation. Such disclosure would also have a prejudicial impact on the conduct of the United States' foreign affairs and on the relations of the United States with other governments. Accordingly, as Attorney General of the United States, I formally claim privilege as to the information relating to the mail covers, conducted for foreign counterintelligence purposes, which is contained in the investigative files of the named plaintiffs herein.

(d) The subjects and purposes of these mail covers are more fully described in the affidavit of Mr. Thomas W. Leavitt, which is being submitted as Exhibit C for the Court's in camera examination.

7. Exhibit D

(a) The files pertaining to three of the plaintiffs contain information obtained by the Federal Bureau of Investigation from, or which would disclose a cooperative relationship with, the intelligence services of certain foreign governments friendly to the United States.

(b) A fundamental element of the cooperative relationship between the Federal Bureau of Investigation, as an agency of the United States Government, and the intelligence service of a foreign government is an express promise of confidentiality. To disclose information which would reveal this cooperative relationship would violate this promise and could reasonably be expected to cause the foreign intelligence service to terminate the relationship. Such a result would significantly damage the United States' ability to gain important national security information and would thus have a prejudicial impact on the public interest and the security of the United States. Accordingly, as Attorney General of the United States, I formally claim privilege as to the information contained in plaintiffs' files which was obtained from an intelligence service of a foreign government or would disclose a cooperative relationship between the Federal Bureau of Investigation and the intelligence service of a foreign government.

(c) The nature of the circumstances regarding this aspect of the claim of privilege is more fully described in the affidavit of Mr. Thomas W. Leavitt, which is being submitted as Exhibit D for the Court's in camera examination.

8. I respectfully request that the Court treat the contents of the _in camera_ exhibits in a secure fashion and return the exhibits to the Department of Justice at the conclusion of the hearing in this matter. The Department

of Justice will retain these exhibits under the Court's seal subject to any Orders of this Court or other Court of competent jurisdiction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On:
Sept. 22, 1977

Griffin B. Bell
GRIFFIN B. BELL
Attorney General of the
United States

Hobson, vol 3 (Oct 77 - Ap 78)

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
JERRY WILSON, et al.,	)	76-1326
Defendants.	)	

NOTICE OF FILING CLAIM OF PRIVILEGE BY THE SECRETARY OF THE ARMY AND SUBMISSION OF IN CAMERA EXHIBIT

Please take notice that defendant Clarence M. Kelley, pursuant to this Court's order of June 24, 1977, has filed the attached AFFIDAVIT AND CLAIM OF PRIVILEGE by the Secretary of the Army regarding certain information provided by the United States Army to the Federal Bureau of Investigation. This affidavit is accompanied by an *in camera* exhibit, identified as Exhibit F.

DATED: February 17, 1978

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 76-1326
)
JERRY WILSON, et al.,)
)
Defendants)
)

AFFIDAVIT AND CLAIM OF PRIVILEGE

COUNTY OF ARLINGTON)
) ss
COMMONWEALTH OF VIRGINIA)

I, CLIFFORD L. ALEXANDER, JR., being duly sworn, depose as follow:

1. I am the Secretary of the United States Army, a Department of the Executive Branch of the United States. I have official custody and control of the files and records of the United States Army. The matters stated herein are based upon my knowledge and upon my personal review and consideration of information available to me in my official capacity.

2. In response to a court order for production of documents in the case Julius Hobson, et al. v. Jerry V. Wilson, et al., Civil Action No. 76-1326, I submit this affidavit and claim of privilege on behalf of the United States of America with regard to a number of Army-originated documents discovered in the files of the Federal Bureau of Investigation. They are described in paragraph 3, below. I have personally reviewed and considered each of the items as to which I am asserting privilege.

I hereby claim the executive [illegible]

consists of portions of thirty-four pages of documents found in FBI files which are classified under the provisions of Executive Order No. 11652. Copies of these portions of pages have been marked "Army," numbered 1 through 34 serially, and returned to the FBI. This affidavit addresses only the Army information contained in these documents.

4. The information over which I assert privilege was collected by the United States Army in West Berlin between 1963 and 1970. The Army organization that collected the information was responsible for monitoring certain activities in the United States Sector of West Berlin, and operated pursuant to instructions of the United States Commandant of Berlin. The principal responsibility of this collection operation was to help maintain the security of West Berlin, particularly the American Sector of West Berlin, and to collect information on the Soviet Union and Eastern European countries. The operation continues today and its activities are closely monitored by the civilian leaders of the Department of Defense, Department of Justice and national intelligence community.

5. Extant Army records indicate that the information being sought by the plaintiffs was collected in the course of a program to monitor the activities of Soviet and East European intelligence services. The documents were provided to the FBI representative in Bonn. The program was targeted against organizations in East Berlin believed to be "front" organizations for hostile intelligence services and against individuals operating under assumed names believed to be agents for hostile intelligence services. These individuals and organizations were

believed to have been maintained by hostile intelligence services, often given English-language names and staffed by English-speaking personnel, for the purpose of communicating with and contacting persons in the West. Upon establishing a communication link, the individual or organization would attempt to solicit information of interest to Soviet and East European intelligence services and at times would try to recruit U.S. citizens as agents. Generally speaking, such individuals and organizations sought both classified and unclassified information on military, economic, social and political trends in the United States.

6. Based upon Army files, it is believed that the information sought by the plaintiffs was collected under this particular program. The information was not acquired by Army intelligence in the course of any effort targeted against any of the plaintiffs. There is no evidence in Army files that the information was of interest to Army intelligence or was even retained by the Army. It is likely, however, that the Army would have viewed the information only as evidence of the activities and capabilities of the hostile intelligence services, and would have used the information only to make assessments of the successes and capabilities of particular hostile intelligence collection efforts. Twenty-four of the thirty-four pages of material sought by the plaintiffs relate solely to intelligence collection efforts conducted before January 1, 1967, which is the earliest date mentioned in the factual allegations made by the plaintiffs. These documents relate to a national organization of which one of the plaintiffs was a member. The remaining ten pages, all dated after January 1, 1967, are also confined to the same national organization and neither mention nor bear any relation to the Washington, D. C. area -- the area in which

the complaint alleges wrongful acts. The information on the organization relates solely to the professional activities of the organization and is not derogatory.

7. The type of information sought by the plaintiffs is sensitive to the national security of the United States and, despite its age, is still properly classified under Executive Order 11652. Release of this type of information would have the following deleterious effects:

a. Release would reveal the extent to which the United States has been able to identify particular individuals and organizations as information collectors for Soviet and Eastern European intelligence services. It would reveal also the names of particular information collectors who, despite their cover identifies, have been identified by U.S. Intelligence. Information of this sort could be of obvious value to hostile intelligence services.

b. Release of the information would indicate in part the capacity of the United States Army to monitor the activities of East Berlin organizations from locations within West Berlin.

c. Release of the information would partially reveal the capabilities and techniques of the Army intelligence operation that collected the information.

8. There is an additional reason why information relating to this Army intelligence operation should not be released. This operation is run by the Army on behalf of the federal government. It also responds to requests from foreign governments, which are particularly concerned about the secrecy of the operation. Our diplomatic relationships with these governments and our ability to

obtain valuable information from them would be appreciably weakened if the information plaintiffs now seek were publicly released. Although the documents plaintiffs seek do not specifically reflect the involvement of foreign governments, revelation of the activity's scope can impact on such governments. Moreover, very similar documents do reflect such involvement and release here may serve as a precedent which will ultimately result in the release of such documents. Both effects could significantly damage U.S. national security interests.

9. In view of the above, I certify that it would prejudice the public interest and the national security of the United States to disclose the information sought by the plaintiffs in this case. Accordingly, pursuant to the lawful authority of the Secretary of the United States Army, I assert a formal claim of executive privilege over the Army information contained in the 34 pages of material

10. I have executed a classified affidavit to be provided to the Court ex parte and in camera along with copies of the 34 pages of material. This affidavit explains more fully the content of the documents and elaborates upon the reasons mentioned above why disclosure would be damaging to the national security.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Clifford L. Alexander, Jr.

Clifford L. Alexander, Jr.
Secretary of the Army

> which courts do nothing, and about which we never hear.
>
> "Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Brinegar* v. *United States*, 338 U. S. 160, 181 (dissenting opinion).

Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule.

But pragmatic evidence of a sort is not wanting. The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.[8] Moreover, the

experience of the states is impressive. Not more than half the states continue totally to adhere to the rule that evidence is freely admissible no matter how it was obtained.[9] Most of the others have adopted the exclusionary rule in its entirety; the rest have adopted it in part.[10] The movement towards the rule of exclusion has been halting but seemingly inexorable.[11] Since the *Wolf* decision one state has switched its position in that direction by legislation,[12] and two others by judicial decision.[13] Another state, uncommitted until 1955, in that year adopted the rule

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[8] The Director of the Federal Bureau of Investigation has written as follows:

"One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be found guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.

"Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide for fighting crime with intelligence rather than force. . . . In matters of scientific crime detection, the services of our FBI Laboratory are available to every duly constituted law enforcement officer in the nation. Full use of these and other facilities should make it entirely unnecessary for any officer to feel the need to use dishonorable methods.

"Complete protection of civil rights should be a primary concern of every officer. These rights are basic in the law and our obligation to uphold it leaves no room for any other course of action. Although the great majority in our profession have long since adopted that policy, we cannot yet be entirely proud of our record. Incidents which give justification to charges of civil rights violations by law enforcement officers still occur. . . . This state of affairs ought to be taken as a challenge to all of us. Every progressive police administrator and officer must do everything in his power to bring about such an improvement that our conduct and our record will conclusively prove each of these charges to be false." FBI Law Enforcement Bulletin, September, 1952, pp. 1–2.

[9] See Appendix, *post*, pp. 224–225.

[10] See Appendix, *post*, pp. 224–225.

[11] For a discussion of recent developments in British Commonwealth jurisdictions, see Cowen, The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions, 5 Vanderbilt L. Rev. 523 (1952). The author concludes upon a survey of Commonwealth decisions "that there is no uniform rule on the admissibility of evidence procured through illegal searches and seizures." *Id.*, at 546.

[12] North Carolina. See Appendix, *post*, p. 230.

[13] Delaware and California. See Appendix, *post*, p. 226.